Supreme Court, U.S.
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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

WINSTON & STRAWN, *Petitioner*

v.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a $3 million punitive exaction in a case of pure vicarious liability is so excessive as to violate the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

In addition to the named respondent, Hyatt Regency Phoenix Hotel Company, the following were plaintiffs below and are respondents in this proceeding: Nametco Corporation; Barry Shapiro; Lawrence J. Shapiro; Michael S. Haskes; Ben Klimist; Northern Trust Company of Arizona, personal representative of the estates of Sam Shapiro, deceased; and National Metals Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Winston & Strawn respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Arizona in this case.

OPINIONS BELOW

The opinion of the Superior Court of Maricopa County (App., *infra,* 50a-56a) is unreported. The opinion of the Court of Appeals of Arizona (App., *infra,* 1a-49a) is reported at 907 P.2d 506. The order of the Supreme Court of Arizona denying the petition for review (App., *infra,* 57a-58a) is not separately reported, but is noted at 907 P.2d 506.

JURISDICTION

The court of appeals issued its judgment on March 7, 1995. App., *infra,* 1a. The Arizona Supreme Court denied Winston & Strawn's timely filed petition for review on December 19, 1995. App., *infra,* 57a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

Two threads run through virtually all modern-day punitive damages cases involving organizational defendants: imposition of punitive damages for conduct that often is minimally wrongful and single-minded emphasis on the defendant's substantial financial condition in setting the amount of punishment. It is hard to imagine a starker example of that pattern than the present case. All four of the judges that reviewed the verdict agree that Winston & Strawn did nothing wrong at all; it was held liable for $3 million in punitive damages on a pure vicarious liability theory. Moreover, the Court of Appeals' principal (if not exclusive) basis for upholding this hefty $3 million "punishment" was the fact that the exaction is not an overly large percentage of

Winston & Strawn's gross revenues. No real consideration (only lip service) was given to whether this kind of massive vicarious penalty is reasonably related to the state's interests in retribution and deterrence. Indeed, it simply is impossible to justify the penalty by reference to either of those objectives. This case thus exemplifies the need for this Court to continue the process of articulating the constitutional limits on punitive damages.

1. *The Development of the Phoenix Hyatt Regency.* Respondent Hyatt Regency Phoenix Hotel Company ("HRP") was a limited partnership formed to develop a Hyatt Regency hotel in Phoenix, Arizona. App., *infra,* 2a. The other respondents were general partners in HRP. In December 1973, HRP retained Chanen Construction Company ("Chanen") to serve as the general contractor for the hotel. *Id.* at 2a; 5/7 Tr. 83; P. Exh. 2.[1] The parties' contract was an American Institute of Architects ("AIA") "Standard Form of Agreement between Owner and Contractor," and the basis of payment was the cost of work plus a fee. App., *infra,* 2a; 5/7 Tr. 11-12; P. Exh. 2. As part of the agreement, HRP and Chanen adopted the AIA "General Conditions of the Contract for Construction." P. Exh. 2, AIA Document A201. Among other things, that contract obligated Chanen to indemnify HRP for claims and losses caused in whole or part by the negligence of Chanen or one of its subcontractors. *Id.* ¶ 4.18.1. The contract also unambiguously provided that any dispute between HRP and Chanen would be resolved through arbitration, not in court. *Id.* ¶ 7.10.1.

On July 11, 1974, Chanen signed an Equipment Lease with Form-Eze Systems, Inc. ("Form-Eze"), pursuant to which Form-Eze agreed to furnish certain equipment — primarily, metal forms for concrete, structural columns,

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[1] Because each day of the trial transcript was separately paginated, we cite the transcript by date and page number. Thus, the designation "5/7 Tr. 83" refers to page 83 of the May 7, 1991 transcript.

beams, and decks — for the construction of the hotel. App., *infra,* 2a; P. Exh. 5. Chanen and Form-Eze also entered into a Labor Guarantee Agreement, under which Form-Eze guaranteed that the cost of all necessary labor would not exceed a specified amount (P. Exh. 6), and a Letter of Clarification providing that Form-Eze's material on the site would serve as security for the Labor Guarantee Agreement (P. Exh. 7). Chanen signed all of the purchase orders, including the one for the Equipment Lease, as "Agent for Hyatt Regency Phoenix Hotel Company." P. Exh. 4; 5/7 Tr. 24-25.

Form-Eze soon fell significantly behind schedule for its work on the hotel. App., *infra,* 3a. In November 1974, Chanen removed Form-Eze's supervisor from the job, but it continued until July 1975 to use Form-Eze's forms to construct the hotel. App., *infra,* 3a; 5/7 Tr. 28-30, 57, 63. On August 5, 1995, Chanen's project manager, James Raine, wrote to Barry Shapiro, HRP's managing general partner, to inform him that the cost of setting the forms had exceeded the guaranteed cost by $215,826. Raine expressed his opinion as a "layman[]" that "Form-Eze owes us a lot of money" and specifically requested "direction" from Shapiro (who is a lawyer) about what course of action to pursue. P. Exh. 19; 5/7 Tr. 63-64. The very next day, Shapiro wrote to Raine that "subject to my talking to Art Greenfield [the attorney who was advising both HRP and Chanen on matters relating to Form-Eze] when he returns [from a trip], it would appear that the direction which we should pursue with Form-Eze is to continue to hold the forms * * * as a means of leverage in collecting at least some of the excess dollars which you figure they owe us." P. Exh. 20; 5/7 Tr. 64-65; 5/8 Tr. 14. Chanen then took the forms from the job site to a storage area owned by respondent National Metals Company, another entity controlled by the Shapiro family. 5/7 Tr. 65-67.

At some point thereafter, Greenfield, who was then a partner at the firm of Snell & Wilmer, consulted with Jon

Cohen, a Snell & Wilmer lawyer who specialized in security interests and liens under the Uniform Commercial Code, regarding the validity of HRP's and Chanen's security interest in the forms. 5/14 Tr. 109-111. Cohen advised Greenfield that retaining the forms to assert a possessory lien was appropriate. *Id.* at 111. Greenfield conveyed that advice to Barry Shapiro. *Ibid.*

2. *Form-Eze Sues Chanen and HRP.* In December 1974, Form-Eze filed suit against Chanen in New Mexico state court alleging that Chanen improperly used its forms and improperly barred Form-Eze's supervisor from the site. Chanen retained Greenfield to represent it in the lawsuit. 5/7 Tr. 35-36; 5/14 Tr. 82, 95. Snell & Wilmer had represented Chanen previously, and Greenfield was a member of the company's board of directors. 5/7 Tr. 42; 5/14 Tr. 83, 91-93. On Greenfield's motion, the court dismissed the case for lack of personal jurisdiction. 5/7 Tr. 57; 5/14 Tr. 96; 5/15 Tr. 60; P. Exh. 15. HRP paid Snell & Wilmer's invoice for Greenfield's services to Chanen in the New Mexico suit. 5/14 Tr. 96-97.

On July 29, 1975, Form-Eze filed suit against both Chanen and HRP in federal court in Phoenix. P. Exh. 18.[2] Form-Eze alleged that the defendants breached the Equipment Lease by failing to pay $126,281 for use of the forms and that they breached the Labor Guarantee Agreement by, *inter alia,* refusing to cooperate with Form-Eze's job supervisor and by barring him from the site, for which it sought $60,100 in damages. *Ibid.* Form-Eze further alleged that Chanen "was and is the duly appointed and acting agent of [HRP] and dealt with Form-Eze in that capacity." *Id.* at 2. On August 22, 1995, Form-Eze amended its complaint to add a tort claim, alleging that the defendants had wrongfully refused to return the leased equipment. P. Exh. 23, at 5-7.

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[2] The complaint also named the general partners of HRP as defendants. See P. Exh. 18.

3. *HRP and Chanen Retain Greenfield.* HRP and Chanen each retained Greenfield to defend the case. 5/7 Tr. 109-110; 5/14 Tr. 98-100. Greenfield's firm, Snell & Wilmer, had represented the Shapiro family, the general partners of HRP, since the 1940s, and Greenfield had personally handled several matters for the Shapiros and had socialized with them. 5/7 Tr. 77-78, 84; 5/14 Tr. 83-91. At the time he retained Greenfield on HRP's behalf, Barry Shapiro did not believe that there was any conflict of interest in Greenfield's representation of both Chanen and HRP because "[their] interests were the same" — namely, to defeat Form-Eze's claims. 5/8 Tr. 51.

On September 24, 1975, Greenfield filed an answer on behalf of both defendants, admitting that "Chanen was acting as agent for and on behalf of its disclosed principal, HRP," but denying that either defendant had breached either the Equipment Lease or the Labor Guarantee Agreement. P. Exh. 26, at 2-6. Throughout the Form-Eze litigation, Greenfield adhered to the position that Chanen was not liable *with respect to the contract claims* because it signed the contract as agent for a disclosed principal, HRP. 5/14 Tr. 30; 5/15 Tr. 76.[3]

Greenfield's answer also denied liability for the tort claim on the ground that the defendants were entitled to maintain possession of the leased equipment as security for Form-Eze's default under the Labor Guarantee Agreement. P. Exh. 26, at 6-7. The answer also asserted a counterclaim on behalf of Chanen and HRP alleging that Form-Eze owed $211,528 for cost overruns. P. Exh. 26, at 8-11.

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[3] Under Arizona law, an agent who signs a contract on behalf of a disclosed principal is not liable for the principal's breach of that contract. See App., *infra*, 4a n.1; *Ferrarell* v. *Robinson*, 465 P.2d 610, 612 (Ariz. Ct. App. 1970). Importantly, however, this immunity does *not* extend to tort claims. 5/13 Tr. 61.

In January 1976, Inryco, Inc. ("Inryco") intervened, alleging that it had purchased the forms from Form-Eze in December 1974 and that Chanen and HRP had refused to deliver the forms to Inryco. P. Exh. 30. Inryco, like Form-Eze, alleged that Chanen had acted as the agent of HRP in dealing with Form-Eze. *Id.* at 2. In the answer to the complaint in intervention, Greenfield again admitted on behalf of Chanen and HRP that "Chanen was acting as Agent for and on behalf of its disclosed principal, HRP." P. Exh. 38, at 2.

On July 8, 1976, Greenfield moved on behalf of Chanen for judgment on the pleadings with respect to the breach of contract claims, arguing that, because Chanen was acting as the agent of a disclosed principal, it could not be liable for the principal's alleged breach of contract. He did not seek judgment on the tort claim under this theory. P. Exh. 49. The court denied the motion. 5/9 Tr. 33.

4. *Chanen and HRP Arbitrate Their Disputes Using Separate Counsel.* While the Form-Eze case was pending, disputes arose between Chanen and HRP with respect to Chanen's performance and right to payment. Chanen filed a lien against the hotel and, in March 1976, HRP responded by filing suit against Chanen alleging that it did not owe Chanen any money and that, because of cost overruns, Chanen owed HRP money. 5/8 Tr. 49; 5/13 Tr. 17. Because HRP and Chanen were adverse in this lawsuit, Greenfield (and Snell & Wilmer more generally) declined to represent either one of them. 5/7 Tr. 99-100; 5/8 Tr. 49-50; 5/14 Tr. 140. Accordingly, each retained separate counsel. 5/7 Tr. 100; 5/8 Tr. 50. Pursuant to the parties' contract, the case was referred to arbitration. 5/7 Tr. 99; 5/8 Tr. 49; 5/13 Tr. 17-18.

Chanen and HRP settled their dispute in October 1977. P. Exh. 60; 5/13 Tr. 7. Under the terms of the settlement, HRP agreed (1) to safeguard the forms until final disposition of the Form-Eze litigation or until earlier disposition of the forms by agreement and (2) to indemnify Chanen and hold it

harmless from any recovery by Form-Eze or Inryco based upon the alleged wrongful conversion of the forms. P. Exh. 60; 5/8 Tr. 68-70. HRP did not agree to indemnify Chanen from any recovery that resulted from any fault on the part of Chanen. P. Exh. 60; 5/8 Tr. 70.

5. *The Trial of the Form-Eze Case.* On July 1, 1978, Greenfield and others left Snell & Wilmer and formed Craig, Greenfield & Irwin ("CG&I"). 5/13 Tr. 95. By now, Greenfield had been advised that HRP's insurer, Arizona Title Insurance Company ("Arizona Title"), would be managing the Form-Eze litigation for HRP. 5/14 Tr. 173-174. Thereafter, Greenfield met with Arizona Title representatives, sent his bills to Arizona Title, and provided Arizona Title with written reports regarding the status of the case. 5/14 Tr. 180-185; P. Exhs. 77, 78, 84, 85, 90; D. Exhs. 230, 232. Greenfield sought and received instructions from Arizona Title in-house counsel regarding defense strategy, including the decision to try the case before a Special Master. 5/14 Tr. 180-183.

The parties tried the Form-Eze case before a Special Master on March 19-27, 1980. 5/13 Tr. 96. On December 8, 1980, the Special Master announced that he had found in favor of Form-Eze and Inryco and against both Chanen and HRP. 5/13 Tr. 96; 5/15 Tr. 108; P. Exh. 97. The Special Master requested that Form-Eze and Inryco prepare proposed findings of fact and conclusions of law. P. Exh. 97, at 22-23, 28.

6. *Proceedings After Greenfield Joined Winston & Strawn.* On March 1, 1981 — six years after Chanen and HRP agreed to Greenfield's joint representation in the Form-Eze litigation, almost a year after the completion of the trial and three months after the Special Master announced his finding that HRP and Chanen were liable — the CG&I attorneys, including Greenfield, joined Winston & Strawn. 5/13 Tr. 95; 5/14 Tr. 79. Prior to that time, Winston &

Strawn had no involvement with Chanen, HRP, Greenfield or the Form-Eze litigation.

Because the trial already had occurred and the Special Master had indicated his intention to impose liability jointly and severally against HRP and Chanen, Greenfield's involvement in the Form-Eze litigation after joining Winston & Strawn was extremely limited. On March 2, 1981, the day after he joined Winston & Strawn, Greenfield filed with the Special Master a 36-page response to the proposed findings of fact and conclusions of law, reiterating arguments previously made numerous times on behalf of Chanen and HRP. P. Exh. 100. Although he again argued briefly that Chanen should not be liable on the contract claims because it was the disclosed agent of HRP (*id.* at 29-30), the overwhelming majority of the brief was devoted to contesting the liability findings against *both* defendants. On June 25, 1981, the Special Master held a hearing on damages. Michael Rollins, a lawyer who had worked with Greenfield on the Form-Eze case since October or November of 1979, attended the hearing on behalf of HRP and Chanen. App., *infra,* 7a; 5/14 Tr. 5, 12.

On September 15, 1981, the Special Master issued a report *rejecting* the "disclosed principal" argument and finding that Chanen had breached the Labor Guarantee Agreement by unilaterally dismissing Form-Eze's supervisor, that Chanen and HRP had no security interest in the forms at the time of the termination of the Labor Guarantee Agreement, and that Chanen and HRP had wrongfully retained the forms after July 1975. P. Exh. 109. The report recommended that damages in the amount of $3,600,000 be imposed jointly and severally against Chanen and HRP. App., *infra,* 7a; P. Exh. 109, at 13-14; 5/7 Tr. 140, 145-146. Of that total, only approximately $120,000 were for the contract claims. P. Exh. 109, at 10, ¶¶ 69-70; 5/14 Tr. 68-69. The remaining amount constituted tort damages. P. Exh. 109, at 12-13, ¶¶ 79-85. Greenfield objected to the report on

numerous previously asserted grounds, each of which the Special Master rejected. P. Exhs. 110, 112.[4]

After HRP and Chanen each retained new counsel to represent them separately, the district court adopted many of the Special Master's findings but reduced the amount of damages to approximately $800,000. P. Exhs. 261, 125. The Ninth Circuit later altered the amount of damages assessed against Chanen and HRP to $1,600,000. P. Exh. 126; 5/7 Tr. 149. Of this amount, HRP ultimately paid $265,836.40 to Form-Eze and $546,071.87 to Inryco. P. Exhs. 130, 131; 5/7 Tr. 149-150. From the time the Ninth Circuit's decision became final until the statute of limitations ran six years later, HRP was fully entitled to bring an indemnification action against Chanen. 5/9 Tr. 137; 5/16 Tr. 58-61. HRP opted not to do so. 5/8 Tr. 89-90; 5/9 Tr. 137.

7. *Respondents Sue Winston & Strawn.* On December 30, 1987, respondents filed this malpractice action against Greenfield and CG&I, alleging that Greenfield had acted negligently with respect to his representation of HRP in the Form-Eze litigation. Even though Greenfield had joined Winston & Strawn more than 5½ years after he had begun his joint defense of HRP and Chanen and several months after the Special Master had announced his intention to find HRP and Chanen jointly liable in the Form-Eze litigation, respondents included Winston & Strawn as a defendant.

Prior to trial, Greenfield and CG&I settled the claims against them for a total of $1,500,000, which more than covered HRP's liability to Form-Eze and Inryco. App., *infra,* 9a. Respondents unilaterally allocated $500,000 of the

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[4] Although Greenfield again raised the "disclosed principal" theory — no doubt for preservation purposes only at this point — the overwhelming percentage of each filing was devoted to arguments designed to absolve *both* defendants of liability. See P. Exhs. 110, 112.

settlement to compensatory damages and $1,000,000 to punitive damages. *Id.* at 9a.

At the trial against Winston & Strawn, respondents focused entirely on whether Greenfield had committed malpractice in representing both HRP and Chanen in the Form-Eze litigation. Respondents presented no evidence that Winston & Strawn had anything to do with HRP, Chanen, Form-Eze or Greenfield before Greenfield joined the firm on March 1, 1981 — 5½ years after the initiation of the litigation and well after the Special Master had resolved liability. Further, their case being premised strictly on the doctrine of respondeat superior, respondents presented no evidence suggesting that Winston & Strawn had employed inadequate conflict-checking procedures at the time Greenfield joined it or that anyone at Winston & Strawn other than Greenfield acted wrongfully after Greenfield joined the firm. Instead, respondents simply concentrated on demonstrating the continuation of Greenfield's conflict of interest after that point in time.

Respondents' expert witnesses testified that Greenfield fell below the standard of care by representing both Chanen and HRP in the face of a conflict of interest. These witnesses focused in particular on Greenfield's invocation of the "disclosed principal" defense on behalf of Chanen and his failure to present a cross-claim for indemnification on behalf of HRP based on the AIA contract between HRP and Chanen. 5/8 Tr. 117-126, 138-141, 145-146, 165; 5/9 Tr. 16-37, Tr. 104-116. One of those witnesses conceded, however, that neither Greenfield nor anyone at Winston & Strawn could have done anything to relieve HRP of liability in the Form-Eze litigation after Greenfield joined Winston & Strawn on March 1, 1981. 5/8 Tr. 185. Another testified that, "if on March 1 Mr. Greenfield had woken up to the fact that there was no colorable basis on which HRP was holding the form work," he could have saved HRP three-months' worth

of damages for the rental value of the forms. 5/9 Tr. 74-75.[5] No witness testified that HRP's injury was proximately caused by any act or omission on the part of Greenfield after he joined Winston and Strawn.

Respondents' closing arguments focused almost exclusively on Greenfield and his alleged misconduct during the entire course of the Form-Eze litigation. Respondents turned to Winston & Strawn only when addressing the issue of punitive damages. In that regard, respondents' counsel repeatedly urged the jury to punish Winston & Strawn on improper grounds. For example, he began his summation by suggesting that the jury could express its outrage about completely unrelated injustices by punishing the out-of-state lawyers at Winston & Strawn, stating:

> I don't know how you feel about life, but if you have any sense of life as I live it, I have a sense of a lack of control. **I cannot do much about the savings and loan scandal except I guess pay taxes until the day they put me down.** I suspect you probably don't have any more control over that than I do.
>
> **And I must sit by, and I suspect you must also, and let whatever punishment is going to be meted out to our state legislators for the AZScam scandal.** And I cannot go in and plead to the judge

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[5] It is questionable indeed whether Greenfield's failure to give up on the contention that the Labor Guarantee Agreement entitled HRP and Chanen to hold the forms — which was based in part on the advice of a U.C.C. expert at his prior firm — was even negligence, let alone a departure from the standard of care so extreme as to serve as a basis for punitive damages. In any event, this alleged failing was wholly unrelated to the only contention that could support punitive damages — that Greenfield conducted the litigation so as to protect his favored client, Chanen, at the expense of HRP. To the extent Greenfield erred by failing to advise HRP to return the forms, his error harmed HRP and Chanen equally.

> that there should be either probation or perhaps a stiffer sentence. I suspect, likewise, you can't.
>
> But this case by the coincidence of your jury service and the fact that this case came to this courtroom at this time gives you an opportunity actually to make a statement, a statement that goes far beyond Barry Shapiro or Arthur Greenfield or Winston & Strawn.
>
> * * * * *
>
> I suggest that this case gives you the opportunity to tell lawyers that they have more than lip service responsibility to the Code of Professional Responsibility. I suggest further that this decision involving as it does one of the most powerful law firms in the country, Winston & Strawn, it's a decision that will be studied not only in Phoenix, Arizona or the state of Arizona, but certainly **in Chicago where it has its main office and certainly in Washington where it has a significant presence**.

5/20 Tr. 4-6 (emphasis added). He concluded his opening summation on the same lawyer-bashing note, stating: "I'm going to ask you, and again this isn't going to make me very popular at the bar convention, to **send a message to all lawyers**." *Id.* at 33 (emphasis added). See also *id.* at 73 ("[P]lease, I have watched all my life, representing plaintiffs as I do, **the rich and the powerful get away with it**. Don't let it happen here.") (emphasis added); *id.* at 81 (one answer jury can give is "we let the lawyers get away with it again").

Unable to identify any misconduct on the part of Winston & Strawn to justify a large punishment, respondents' counsel based his request for a multimillion dollar punitive windfall exclusively on Winston & Strawn's financial worth, stating: "I'm going to tell you in a moment the gross revenues of Winston and Strawn. They're going to amaze you. They are rich and they are powerful." *Id.* at 15. He then unabashedly

encouraged the jurors to express their antipathy to wealthy lawyers by punishing Winston and Strawn:

> I haven't talked a lot about the power of Winston and Strawn, but when you look at Exhibit 265, consider $96 million a year is what Winston and Strawn makes in gross revenues. Actually goes over 97. Winston and Strawn's net worth runs to the tens of millions of dollars.
>
> If you are going to send a message to say this conduct will not occur again, you have to reflect that this is a very large company. $10,000, $500,000, you're not even going to get their attention. **They're not going to look up from their coffee. They're not going to rearrange their European vacations.**

Id. at 29 (emphasis added).

At the close of trial, the court instructed the jury, over Winston & Strawn's objection, that Winston & Strawn was strictly liable for punitive damages under the doctrine of respondeat superior. 5/20-21 Tr. 10-11; 5/16 Tr. 77-79. The following day, the jury returned a verdict in favor of HRP in the amount of $1,238,568 in compensatory damages and $3,000,000 in punitive damages. 5/20-21 Tr. 19.

Winston & Strawn then filed its post-trial motions, which the trial court denied, although not without reservations. In particular, on the issue of Winston & Strawn's liability for punitive damages, the court stated (App., *infra,* 54a):

> There is no question but that the award of punitive damages in this case against Winston & Strawn was based solely upon a theory of *respondeat superior*. There was no claim that Winston & Strawn acted negligently or punitively other than through the actions of Greenfield. While this Court has substantial doubts as to whether the purposes

> behind the award of punitive damages are served by the application of *respondeat superior,* particularly when the party whose conduct is the basis for the award of punitive damages is an experienced lawyer whose conduct is not subject to the same kind of supervision and close scrutiny as the conduct of many other types of employees, this Court is bound by appellate authority on this issue.

The court also summarily rejected Winston & Strawn's argument that the $3 million punishment was unconstitutionally excessive. Focusing solely on Winston & Strawn's financial condition, the court explained that "[a]lthough the amount of punitive damages awarded is large, based on the evidence presented concerning the financial worth of the Defendant, the amount can not be said to be indicative of passion or prejudice, but upon the jury's consideration of the instruction and the purpose for which punitive damages are assessed." App., *infra,* 54a.

The trial court did order that the punitive exaction be offset by the $1 million that had been allocated to punitive damages in the settlement with Greenfield. App., *infra,* 55a-56a. It also required that the compensatory award be offset by the $500,000 that had been allocated to compensatory damages in the Greenfield settlement. *Id.* at 55a.

7. *The Arizona Court of Appeals' Decision.* A divided panel of the court of appeals affirmed the jury's compensatory and punitive damages awards. Adhering to the position that punitive damages may be imposed on a pure vicarious liability theory, the majority held that "[t]here is clear and convincing evidence that in representing both HRP and Chanen, Greenfield consciously disregarded HRP's rights under the AIA contract and exposed HRP's partners to unjustifiable risks of personal liability." App., *infra,* 21a.

The majority then held that the amount of punitive damages did not violate Winston & Strawn's due process rights, stating:

> The award is proportionate to Winston & Strawn's financial position; it represents approximately 3.1 percent of the firm's gross revenues for 1990. The record supports the jury's determination that for almost a year Winston & Strawn, through Greenfield, consciously disregarded its client's interests, tried to shift all liability for a potential $3.6 million judgment from a more favored client to HRP, and concealed this conduct from HRP. The punitive damage award is less than half of what HRP requested, less than three times HRP's compensatory damages, and significantly less than the liability that Greenfield sought to have HRP bear. We conclude that the award serves the goals of punishment and deterrence without financially devastating Winston & Strawn.

App., *infra,* 27a (footnote omitted).

Finally, although affirming the setoff against the compensatory award (*id.* at 34a-38a), the Court of Appeals reversed the setoff against the punitive exaction (*id.* at 38a-40a), thus leaving Winston & Strawn obligated to pay $3 million in punitive damages on a pure vicarious liability theory.

Judge Noyes dissented from all aspects of the decision other than the affirmance of the setoff against the compensatory damages. App., *infra,* 40a. On the issue of Winston & Strawn's liability for punitive damages, he echoed the trial court's concerns (*id.* at 41a-42a) and stated that "[w]hat happened in this trial and appeal to Winston & Strawn is reason enough to reconsider Arizona law regarding vicarious liability for punitive damages" (*id.* at 42a).

Judge Noyes also concluded that, even under a vicarious liability theory, the imposition of punishment against Winston & Strawn was unsupported by the evidence because "the real damage to HRP was done when the Special Master announced his liability verdict on December 8, 1980 — three months *before* Greenfield joined Winston & Strawn." App., *infra,* 42a-43a (emphasis in original). Judge Noyes noted that Greenfield's invocation of the "disclosed principal" defense on Chanen's behalf could not justify the verdict because "the Special Master rejected this argument, the district court rejected it, and the Ninth Circuit rejected it." *Id.* at 43a. In other words, although this alleged act of disloyalty to HRP was a central part of respondents' case, it in fact had no causal relationship to HRP's loss. Judge Noyes concluded that "[i]f there was malpractice by Greenfield regarding what he did or did not advise HRP to do with the forms, the malpractice affected Chanen and HRP equally, it was not done with an evil-minded favoring of Chanen over HRP, and it was done long before March 1, 1981 — all of which means that there is no legal reason to penalize Winston & Strawn for that behavior." *Id.* at 45a-46a.

Judge Noyes also found the amount of the punishment to be so excessive as to be "unconstitutional, a taking without due process of law." App, *infra,* 48a. He explained (*id.* at 47a-48a):

> Assuming that the evidence supported any award of punitive damages for Greenfield's evil-minded conduct after March 1, 1981, the gross (or net) revenues of Winston & Strawn are an unfair measure of punishment. By comparison, all direct and vicarious liability for Greenfield's evil-minded conduct for the sixty-eight-month period from July 1975 to March 1981 was settled for a $1 million penalty. Winston & Strawn's exposure for Greenfield's conduct was six months, March to September, 1981. That Winston & Strawn had the

> misfortune of hiring Greenfield when it did, rather than six months later, is no reason for a $3 million penalty.

Judge Noyes had little difficulty discerning the source of the remarkable punishment in this case: it was "HRP's call to arms against rich and powerful lawyers who 'get away with it.'" App., *infra,* 46a. In his view, "[t]he jury did exactly what it was asked by HRP to do; it punished Winston & Strawn for wrongs much greater than — and wrongs completely unrelated to — the evil-minded conduct of Arthur P. Greenfield after March 1, 1981." *Id.* at 47a.

8. *Subsequent Proceedings.* On December 19, 1995, the five-member Arizona Supreme Court denied discretionary review, with one judge dissenting without opinion and one judge abstaining. App., *infra,* 57a. On January 11, 1996, the Arizona Court of Appeals stayed execution of the judgment pending the timely filing and disposition of a petition for certiorari.

REASONS FOR GRANTING THE PETITION

This is a case in which a defendant that itself did nothing at all wrong stands to be mulcted in punitive damages to the tune of $3 million for conduct that caused the plaintiffs little or no harm during the period that the principal alleged wrongdoer was associated with the defendant. The sole available "justification" for the punishment is, as the dissent below noted, that the defendant is capable of paying it. The case is a paradigm of a pervasive and malignant injustice that is all too common on the contemporary legal scene. It cries out for correction by this Court.

The Court has granted certiorari in *BMW of North America, Inc.* v. *Gore,* No. 94-896, to consider, among other things, whether the $2 million punitive damages award in that case is so excessive as to violate due process. The present petition raises a virtually identical issue. Accordingly, the Court should hold the petition for disposition as appropriate

in light of its decision in *BMW*. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993). If the Court does not reach the excessiveness issue in *BMW*, the present case would be a particularly good one in which to do so.

1. *The punishment bears no reasonable relationship to Winston & Strawn's conduct.* Even more so than in *BMW*, the punishment in this case bears no relationship whatever to the nature of the defendant's alleged "misconduct." Indeed, as both the trial court and the court of appeals specifically found, Winston & Strawn did nothing wrong *at all*. It has been held liable for a remarkable $3 million in punitive damages on a *pure* vicarious liability theory for a course of conduct that began long before Winston & Strawn merged with CG&I. Although this Court has indicated that the vicarious imposition of punitive damages is not unconstitutional (*Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 14-15 (1991)), the fact that liability is entirely vicarious is a strong indication that a multimillion dollar punishment is excessive. See *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2726 (1993) (Kennedy, J., concurring).[6]

To the extent that it is proper to consider Greenfield's conduct, rather than Winston & Strawn's (a point we do not concede), the *only* conduct of his that could be considered was in the period after he joined Winston & Strawn. See 5/20-21 Tr. 10-11. By that point, whatever conflict of interest there was had been in existence for 5½ years, the trial was over, it was far too late in the day to add a cross-

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[6] It bears noting that this, unlike *Haslip*, is a case of *pure* vicarious liability. In *Haslip*, there was evidence that the defendant insurer had received, but ignored, complaints about its agent's fraudulent activities. See 499 U.S. at 14. Here, as all four judges to review the verdict agreed, there was no evidence that Winston & Strawn did anything wrong at all. App., *infra*, 11a, 46a-47a, 53a, 54a, 55a.

claim on behalf of HRP against Chanen, and Greenfield was merely reiterating his previously rejected arguments so as to preserve them for appeal. Greenfield's failure to "wake up" on March 1 to the errors he allegedly had been making for 5½ years (see 5/9 Tr. 75) is not sufficiently wrongful to warrant any punitive damages, let alone the $3 million loss that the innocent members of Winston & Strawn will be forced to absorb if the Court of Appeals' judgment is permitted to stand.

Moreover, even if the entirety of Greenfield's conduct could be considered in evaluating Winston & Strawn's punishment (something we suspect that not even respondents would argue), it is ludicrous to suggest that his dual representation of Chanen and HRP — two entities that had a history of being represented jointly (see P. Exhs. 19, 20) — was worthy of $4 million in punishment.[7] If this were the worst instance of conflict of interest known to the legal profession, it still would amount to no more than gross negligence, which (in the absence of grave physical harm) is hardly the kind of tort one would think could result in $4 million worth of civil punishment. In fact, there can be little serious doubt that Greenfield's alleged departure from professional standards was far from the worst kind of misconduct in which an attorney can engage. Although the trial of this case took place almost six years after Greenfield was replaced as HRP's counsel, the record contains no evidence that Greenfield was even charged with a disciplinary violation by the Arizona bar, let alone found guilty of one.

In addition, although respondents' experts testified that Greenfield fell short of the standard of care for attorneys, whether or not he did anything wrong at all was a matter of serious dispute. For instance, while those experts excoriated

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[7] If the entirety of Greenfield's conduct is considered, it follows that the $1 million in punitive damages paid by Greenfield and CG&I for conduct pre-dating the merger with Winston & Strawn also should be considered.

Greenfield for failing to present a cross-claim on behalf of HRP against Chanen, we suspect that most objective observers would find little fault with Greenfield's decision to present a unified defense, while reserving matters of contribution and indemnity for later resolution between the defendants in the event of an adverse judgment. See 5/14 Tr. 56; 5/15 Tr. 28-33.[8] Indeed, because the AIA contract required that disputes between Chanen and HRP be arbitrated, neither Greenfield nor any other attorney could have presented a cross-claim on HRP's behalf.[9]

In short, the $3 million punishment against Winston & Strawn is utterly unrelated to either its own wholly innocent conduct or to Greenfield's conduct during the period after he

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[8] This is not idle speculation. The authors of a well-respected litigation guide have specifically addressed the subject:

> One of the most significant practical problems facing defendants who bring cross-claims is that they may be placed in a posture of blaming each other for the harm allegedly suffered by the plaintiff, much to the plaintiff's delight. This "finger pointing" by the defendants may cause them to carry much of the load of the litigation for the plaintiff as each defendant seeks to produce evidence showing liability by the other defendants.
>
> * * * * *
>
> [T]here are situations where a cross-claim may not accrue until a defendant has been found liable (*e.g.*, indemnity actions). In that situation, there may be no pressing need to bring a cross-claim which will serve only to destroy the "united front" of the defendants.

1 McCUTCHEN, DOYLE, BROWN & ENERSEN, FEDERAL LITIGATION GUIDE ¶1.18, at 1-131 to 1-132 (1996).

[9] By contrast, the "disclosed principal" theory was a defense to the contract claims of Form-Eze and Inryco and therefore had to be raised in the main litigation or not at all.

joined Winston & Strawn. Indeed, the aggregate $4 million in punishment is grossly disproportionate to the gravity of Greenfield's overall misconduct. Accordingly, if the Court concludes that the punishment in *BMW* is excessive in relationship to the petitioner's conduct, that holding surely would require a remand in this case.

2. *The punitive damages are disproportionate to the injury caused to HRP by conduct occurring after Greenfield joined Winston & Strawn.* The Court of Appeals defended the $3 million exaction by comparing it to the amount of compensatory damages awarded to respondents. App., *infra*, 27a. We do not for a moment suggest that the relationship between the punitive damages and the harm caused by the defendant's misconduct is not an extremely important factor. But the Court of Appeals flubbed the comparison. The record reflects that very little, if any, of the $1.2 million in compensatory damages was caused by conduct of Greenfield after he joined Winston & Strawn on March 1, 1981.[10] To the contrary, one of respondents' experts conceded that there was nothing that could have been done after March 1 that would have prevented HRP's injury. 5/8 Tr. 185. The only other witness to offer an opinion on the subject suggested that three-months' worth of tort damages — roughly $6,660[11] —

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[10] Winston & Strawn was held liable for HRP's entire $1.2 million loss because the Arizona courts concluded that Winston & Strawn assumed CG&I's liabilities when the two firms merged. See App., *infra*, 28a-31a, 50a.

[11] Under the Ninth Circuit's judgment, Chanen and HRP were jointly and severally liable for "detention" damages computed by multiplying the value of the forms by the statutory interest rate (10% per annum). P. Exh. 126, at 18-19, ¶¶ 3, 6; P. Exh. 125, at 2-3, ¶¶ 4-5. The value of the forms was $532,625.28 (P. Exh. 126, at 18 (¶¶ 2, 5), so the interest on that sum for three months is $13,315.63. Because Chanen and HRP each paid half of the judgment (5/8 Tr. 89-90), HRP's injury as a result of Greenfield's failure to "wake up" on March 1 and advise it to return the forms was $6,657.82.

could have been averted had Greenfield suddenly woken up on March 1, 1981, abandoned his legal position of four years, and advised his clients to return the forms to Form-Eze. 5/9 Tr. 74-75. Accepting arguendo that his failure to do so was punishable misconduct at all (but see page 11 note 5, *supra*), the punitive damages are **450** times the amount of damages caused to HRP in the period after Greenfield joined Winston & Strawn. If the Court holds the 500:1 ratio in *BMW* to be excessive, that holding will surely bear on the appropriateness of the equivalently startling ratio involved here.

3. *The punishment bears no relationship to Winston & Strawn's "profit."* The $3 million punishment in this case also is grossly disproportionate to the net revenue that Winston & Strawn earned from Greenfield's joint representation of HRP and Chanen. Although the exact amount of fees earned by Winston & Strawn is not in the record, other figures in the record reflect that it was modest. For example, from the time that Arizona Title took over HRP's defense in mid-1978 through the time that Greenfield was replaced as HRP's counsel in late 1981, Arizona Title paid a total of $76,094.44 in fees to CG&I and Winston & Strawn *combined*. P. Exh. 1; 5/7 Tr. 152-154; 5/8 Tr. 90.[12] Given that most of the legal work (including the trial before the Special Master) was done before Greenfield joined Winston & Strawn, it is manifest that only a small portion of the $76,000 was paid to Winston & Strawn. As for Chanen, the record reflects that CG&I billed it only $48,000 *for all matters* in the year before CG&I merged with Winston & Strawn. P. Exh. 263, at 7. Because the trial occurred in that year, it is inconceivable that Winston & Strawn received a substantial amount of fees from Greenfield's representation of

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[12] HRP later reimbursed Arizona Title that amount plus interest. 5/7 Tr. 152-154. HRP sought and received the amount it paid to Arizona Title as part of its damages in this case. See P. Exh. 1; 5/7 Tr. 152-154; 5/8 Tr. 90.

Chanen after he joined Winston & Strawn. Even making the unrealistic assumption that Winston & Strawn earned $48,000 from Chanen and an equal amount from HRP in 1981, the punitive damages would be more than **30** times those legal fees and an even higher multiple of net revenues, the true measure of Winston & Strawn's "profits." A punishment that is so disproportionate to the "ill-gotten" gains is constitutionally suspect.

4. *The Court of Appeals' attempt to justify the punishment by reference to Winston & Strawn's wealth serves only to underscore the need for and appropriateness of review in this case.* The Court of Appeals justified the $3 million punishment principally on the basis of Winston & Strawn's substantial annual revenues, as if earning money from the practice of law itself were the tort for which Winston & Strawn were being punished. App., *infra,* 27a. As Justice White recently recognized for a unanimous panel of the Eighth Circuit, however, "a defendant's wealth cannot alone justify a large punitive damages award." *Pulla* v. *Amoco Oil Co.,* 72 F.3d 648, 659 n.16 (8th Cir. 1995).

This Court repeatedly has expressed concern about the role of an organizational defendant's financial condition in the setting of punitive damages. See, *e.g., Honda Motor Co.* v. *Oberg,* 114 S. Ct. 2331, 2340-2341 (1994) ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses"); *TXO,* 113 S. Ct. at 2723 (plurality opinion) ("[w]e agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations"); *id.* at 2736-2739 (O'Connor, J., dissenting); *Haslip,* 499 U.S. at 6, 19, 22 (repeatedly noting in the course of upholding Alabama's procedures that Alabama does not permit juries to take wealth into account in setting punishment). The present case is proof positive that the Court's concern is not misplaced. Because the only explanation for the massive

exaction in this case is Winston & Strawn's size (and the jury's antipathy to lawyers), this case presents a unique opportunity for the Court to rein in the excessive, unfair, and irrational weight given to financial condition in the punishment of organizational defendants.

5. *The punitive exaction cannot be justified by reference to Arizona's interests in retribution and deterrence.* The Court of Appeals stated that the $3 million exaction against Winston & Strawn "serves the goals of punishment and deterrence." App., *infra,* 27a. That conclusory assertion is frankly inexplicable. Because it is undisputed that Winston & Strawn did nothing wrong, the notion that Arizona has *any* interest in punishing it is absurd. As for deterrence, there is not the slightest bit of evidence to suggest that *any* punitive damages are necessary to induce Winston & Strawn to comport itself with the highest standards of professional integrity.[13]

Even if there were a basis for concluding that *some* amount of punitive damages might advance Arizona's legitimate interests in punishment and deterrence, a punitive exaction is not constitutional merely because it "serves" deterrent and punitive purposes. Under such an approach, "apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *TXO,* 113 S. Ct. at 2719 (plurality opinion) (emphasis in original). The proper inquiry is whether the punishment is "*greater than reasonably necessary* to punish and deter." *Haslip,* 499 U.S. at 22 (emphasis added). See also *TXO,* 113 S. Ct. at 2720 (plurality opinion) (endorsing a "reasonableness" standard). The Court of Appeals offered no explanation — and we can

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[13] In this regard, we must repeat that there is no evidence that Winston & Strawn's procedures for evaluating merger partners were lax or that it had insufficient safeguards in place to monitor the conduct of attorneys once they joined the firm.

imagine none — as to why $3 million does not grossly exceed the amount "reasonably necessary to punish and deter." Its cavalier statement that the $3 million jury-imposed fine in this case "serves" the deterrent and retributive functions underscores the need for further guidance in this area.

* * * * *

In sum, the $3 million exaction in this case is a paradigm of excessiveness. If this Court reaches the excessiveness issue in *BMW* and rules in favor of the petitioner, that ruling surely will require a remand in this case for further consideration. If the Court does not reach the excessiveness issue in *BMW*, this case would be an excellent vehicle for addressing the issue.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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MARCH 1996

APPENDIX A

HYATT REGENCY PHOENIX HOTEL COMPANY, a limited partnership (aka HRP Hotel Company); and Nametco Corporation, Barry Shapiro, Lawrence J. Shapiro, Michael S. Haskes, Ben Klimist and Northern Trust Company of Arizona, Personal Representative of these Estates of Sam Shapiro, Deceased, and National Metals Company, an Arizona corporation, Plaintiffs-Appellees, Cross Appellants,

v.

WINSTON & STRAWN, a law partnership, Defendants-Appellants, Cross Appellees.

No. 1 CA-CV 92-0133.
Court of Appeals of Arizona,
Division 1, Department D.
March 7, 1995.

GRANT, Judge.

This appeal and cross-appeal arise from plaintiffs' (collectively "HRP") suit against defendant Winston & Strawn for the legal malpractice of its former partner, Arthur Greenfield. We affirm the judgment for compensatory and punitive damages against Winston & Strawn but reverse part of the trial court's award of credit for partial satisfaction against the judgment.

I. FACTUAL AND PROCEDURAL HISTORY

We view the facts and all inferences in the light most favorable to sustaining the jury verdict and resulting judgment. *Bradshaw* v. *State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 414, 758 P.2d 1313, 1316 (1988); *Rhue* v. *Dawson*, 173 Ariz. 220, 223, 841 P.2d 215, 218 (App.1992).

A. Construction of the Phoenix Hyatt Regency Hotel

HRP was a limited partnership formed to develop the Hyatt Regency Hotel in Phoenix. Its general partners were Samuel Shapiro; his son, Barry Shapiro; two other members of the Shapiro family; two other individuals; and Nametco Corporation, a Shapiro family business.

In December 1973, HRP hired Chanen Construction Company ("Chanen") to serve as the general contractor for the hotel. The contract between HRP and Chanen was an American Institute of Architects Standard Form of Agreement ("the AIA contract"). Chanen was to be paid the cost of the work plus a fee.

The AIA contract protected HRP in several ways. For instance, the agreement did not create any contractual relations between HRP and any subcontractor. Chanen had to indemnify HRP for certain claims arising out of an act or omission of Chanen. Chanen assumed responsibility for the acts of its employees. HRP was not required to pay any money, except as required by law to a subcontractor. Even though the contract was a cost-plus contract, HRP was not required to pay for costs incurred due to Chanen's negligence.

In July 1974, Chanen entered into an Equipment Lease with Form-Eze Systems, Inc. ("Form-Eze"), pursuant to which Form-Eze furnished metal forms and other materials used to build concrete floors in the hotel. Chanen and Form-Eze also entered into a Labor Guarantee Agreement, under which Form-Eze guaranteed that labor costs for the forming operations would not exceed sixty-five cents per square foot. Form-Eze provided a supervisor with expertise in forming operations, and Chanen supplied the laborers. Form-Eze's equipment on the job-site secured the Labor Guarantee Agreement. Chanen did not enter into these agreements as an agent for HRP.

By November 1974, the forming operations fell significantly behind schedule and a dispute arose between Chanen and Form-Eze. Form-Eze claimed that Chanen had breached the Labor Guarantee Agreement by throwing the Form-Eze supervisor off the job. Chanen countered that Form-Eze had breached the Labor Guarantee Agreement and told Form-Eze that Chanen would retain possession of the leased equipment because the labor costs exceeded the guaranteed maximum by more than $200,000. Chanen continued to use Form-Eze's equipment until the hotel's frame and flooring were completed in July 1975. Chanen then delivered the equipment to a storage yard.

B. The Form-Eze Litigation

In July 1975, Form-Eze sued Chanen, HRP and its general partners in Federal District Court for breach of the Equipment Lease and the Labor Guarantee Agreement, and for wrongful retention of Form-Eze's equipment. Inryco, Inc. later intervened, claiming rights to the equipment by virtue of a sale and lease-back agreement it had entered with Form-Eze. Form-Eze and Inryco alleged that Chanen was acting as HRP's appointed agent.

Form-Eze asked Chanen's attorney, Arthur Greenfield, who was then a partner at Snell & Wilmer, to accept service on HRP's behalf. Greenfield asked HRP's Barry Shapiro if HRP would like Greenfield to represent HRP in the matter and accept service on HRP's behalf; Shapiro said yes. Although Greenfield immediately recognized a potential conflict of interest, he never met jointly with Chanen and HRP to discuss the conflict, and he never obtained a waiver of the conflict from Chanen and HRP. Greenfield also never informed HRP that he served on Chanen's board of directors.

Greenfield answered the Form-Eze and Inryco complaints on behalf of Chanen and HRP, erroneously admitting that Chanen was acting as an agent for its disclosed principal,

HRP.[1] Greenfield's defense theory was that neither defendant had breached the Equipment Lease, and that Form-Eze, not Chanen or HRP, had breached the Labor Guarantee Agreement. Chanen and HRP counterclaimed against Form-Eze for $211,528.57 in cost-overruns. Greenfield asserted that, pursuant to the Labor Guarantee Agreement, Chanen and HRP were entitled to continued possession of Form-Eze's equipment as security for the cost-overruns. Greenfield testified that he could ethically represent Chanen and HRP because of unitary interest created by the cost-plus contract with Chanen in that any recovery from Form-Eze would inure to HRP, but any liability to Form-Eze would be borne by HRP. However, Greenfield never explained to HRP its rights under the AIA contract and the claims and defenses HRP was foregoing by virtue of the joint representation with Chanen.

Early in the case, Form-Eze's counsel, Eric Bistrow, discussed with Greenfield how Chanen was Form-Eze's "principal target." Bistrow suggested that because Greenfield's defense theory shifted any potential liability from Chanen to HRP, Greenfield might have a conflict in representing both defendants. Greenfield acknowledged the possibility of a conflict, but later told Bistrow that he had resolved it.

In April 1977, HRP filed for bankruptcy. Greenfield twice wrote to Barry Shapiro and suggested that in light of the pending bankruptcy, HRP should consider retaining separate counsel in the Form-Eze litigation. Greenfield

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[1] Neither Form-Eze nor Inryco had alleged that Chanen was an agent for a disclosed principal. Under Arizona law, the agent of a fully disclosed principal is not liable in contract for the principal's breach. *Ferrarell* v. *Robinson*, 11 Ariz.App. 473, 475, 465 P.2d 610, 612 (1970). However, the agent for an undisclosed principal may be held liable for the principal's breach of contract. *See generally* Restatement (Second) of Agency § 322 (1958).

advised Shapiro, however, that he did "not believe there is any conflict in our representation of Chanen along with [HRP] as we have been doing." HRP did not retain separate counsel.

In the Spring of 1978, HRP assigned its expected recovery on the counterclaim to Arizona Title Insurance & Trust Company, the insurer of HRP's defaulted construction loans on the hotel. Arizona Title agreed to advance HRP's attorneys' fees[2] to Greenfield's new law firm, Craig, Greenfield & Irwin ("CG&I").[3] HRP remained liable for any judgment against it arising out of the litigation. Greenfield was aware that even though Arizona Title was paying his fees, he owed a duty to his client, HRP.

On September 6, 1979, Greenfield sent HRP notice that a trial before a Special Master appointed by the District Court was scheduled for later that year.[4] Greenfield did not communicate with HRP for another two-and-one- half years. Instead, Greenfield sent status reports, bills and other correspondence concerning the case to Arizona Title.

Greenfield tried the Form-Eze case to the Special Master on March 19-27, 1980. He did not inform HRP that its case was being tried. No HRP witnesses were called, and the AIA contract between Chanen and HRP was not offered as an exhibit. Greenfield offered no evidence on behalf of HRP showing that the retention of the forms was the conduct of Chanen, not HRP. When that issue came up at trial, HRP

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[2] HRP eventually repaid Arizona Title all the attorneys' fees plus interest, a total of over $100,000.

[3] On July 1, 1978, Greenfield left Snell & Wilmer and formed CG&I.

[4] The trial was originally set for December 1979. Although the trial date was continued twice, Greenfield did not inform HRP of the new dates.

had no witness to refute the testimony of Chanen's witness that HRP made the decision to retain the forms.

In a post-trial brief, Greenfield argued that Form-Eze could not "hold Chanen liable since it was acting in an agency capacity for a disclosed principal [HRP]."[5] In response, Form-Eze reiterated its position that Chanen was primarily liable: "In the event [the court] deems that an election be made as to whether Chanen or the other defendants are liable, it is clear that Chanen is the culpable party under the agreements. . . . Plaintiff always looked to Chanen because it clearly believed that its contracts were with Chanen."

On December 8, 1980, the Special Master stated his preliminary conclusion that Chanen and HRP were liable because they had breached the Labor Guarantee Agreement. He directed the parties to supply additional briefing. On February 23, 1981, Form-Eze requested a judgment against Chanen and HRP for $3,326,272.10, plus costs and attorneys' fees.

C. Greenfield's Actions After Joining Winston & Strawn

Greenfield became a partner at Winston & Strawn on March 1, 1981, when CG&I merged with the Chicago firm. Greenfield and his Phoenix partners brought their clients and legal business to Winston & Strawn without liquidating CG&I's affairs.

On March 2, 1981, the day after he joined Winston & Strawn, Greenfield filed a brief arguing, *inter alia*, that Chanen should not be held liable because it was HRP's agent.

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[5] Likewise, in an earlier motion for summary judgment on Chanen's behalf, Greenfield had argued that because "Chanen was acting as agent for a disclosed principal, Chanen has no liability to [Form-Eze or Inryco]." Both Form-Eze and Inryco opposed the motion and the district court denied it.

Greenfield still had not informed HRP that its case had been tried almost a year earlier or of HRP's potential liability.

Greenfield did, however, inform Chanen of these matters. In a letter from Greenfield to Chanen's accountants, he advised that the Special Master's tentative findings "appear to be adverse to defendants [Chanen and HRP]," but that "the issues of agency" would have to be resolved before Chanen's liability "[could] be finally computed." In a letter from Chanen to its accountants, Greenfield opined that Chanen had "a significant chance of using the agency relationship to ultimately protect Chanen."

On June 25, 1981, the Special Master held a hearing addressing the amount of damages to be awarded to Form-Eze and Inryco. Although Greenfield knew that HRP and Chanen faced potential liability of over $3 million, he sent an associate, Michael Rollins, to attend the hearing. The hearing transcript reflects that Rollins appeared on behalf of only Chanen. One of Form-Eze's attorneys later testified that Rollins "did nothing at all" at the hearing. At one point, the Special Master offered Rollins an additional five days to address a legal point. Rollins responded, "Fine, because I haven't gone through the briefs." Rollins later testified that he was referring to briefs handed out at the hearing.

On August 28, 1981, Greenfield argued to the Special Master against finding that Chanen was acting as an agent for an undisclosed principal. Greenfield knew that his argument, if successful, would have completely protected Chanen and left HRP liable for the whole judgment.

On September 22, 1981, the Special Master entered his report holding HRP and Chanen jointly and severally liable for $3.6 million. Greenfield did not inform HRP of the Special Master's findings.

In October and November 1981, Greenfield argued to the District Court, *inter alia*, that the Special Master was wrong in finding that Chanen should be held liable to Form-Eze and

Inryco. In addition to his previously asserted "disclosed principal" argument, Greenfield argued that Form-Eze had elected to release Chanen, thereby leaving HRP solely liable for the judgment. Greenfield had never informed HRP that he would argue, contrary to Form-Eze's contentions, that Form-Eze had elected to hold HRP solely liable.

On February 4, 1982, Greenfield had a package hand-delivered to Barry Shapiro which informed HRP of what had transpired since Greenfield's last communication two-and-one-half years earlier. However, Greenfield's cover letter still did not tell HRP that the Special Master had recommended a $3.6 million judgment against HRP; the letter merely stated that "the short term economic consequences of the report being adopted by the Federal District Judge would be significant to the defendants and to Arizona Title Insurance Company." The letter suggested that a meeting be scheduled between HRP, Chanen, and Arizona Title "for the purpose of reviewing this matter in its current posture" "[b]ecause there are varying interests involved on behalf of all defendants." Enclosed in the package were several pleadings that Greenfield had filed without HRP's knowledge. When Barry Shapiro read the package and realized that he, his father, his brother, and his cousin each faced personal liability of $3.6 million, he "stuck [his] head in the trash bucket and threw up." After receiving the package, Shapiro was unable to reach Greenfield because Greenfield had left town prior to sending the package and was unavailable to take Shapiro's calls.

D. The Conclusion of the Form-Eze Litigation

Aware of the conflict for the first time, HRP immediately retained new counsel to represent it before the District Court which was then reviewing the Special Master's findings. HRP's new counsel tried to correct Greenfield's errors and omissions and attempted to have the District Court re-open the evidence to admit the AIA contract. However, as later explained by the Ninth Circuit Court of Appeals, HRP's

efforts came too late because the Special Master's trial proceedings had already closed.

HRP's new counsel was, however, successful in having the judgment reduced from the $3.6 million recommended by the Special Master to the $1.6 million ultimately ordered by the Ninth Circuit. HRP eventually paid $265,836.40 to Form-Eze and $546,071.87 to Inryco.

E. Procedural History of This Legal Malpractice Action

HRP filed this action against Greenfield, CG&I, and Winston & Strawn on June 24, 1988, alleging that Greenfield had acted negligently and breached his contractual and fiduciary duties to HRP in the Form-Eze litigation. HRP later amended its complaint to seek punitive damages.

Prior to trial, Greenfield and the two malpractice insurance carriers who provided coverage prior to March 1, 1981, settled HRP's claims against Greenfield and CG&I for $1,500,000. HRP allocated $1 million of the settlement to HRP's punitive damage claim against CG&I and Greenfield.

Winston & Strawn proceeded to trial. At the close of the evidence, the court instructed the jury, over Winston & Strawn's objection, that Winston & Strawn was responsible for any acts of Greenfield or CG&I which occurred after July 1, 1978. The court also instructed the jury, again over Winston & Strawn's objection, that it could award punitive damages only for Greenfield's conduct after March 1, 1981, the date he joined Winston & Strawn. The jury found for HRP and awarded $1,238,568 in compensatory damages and $3,000,000 in punitive damages against Winston & Strawn.

The trial court awarded $667,055.01 in prejudgment interest on HRP's compensatory damages and entered its judgment on September 4, 1991. Winston & Strawn filed a Motion For A New Trial Or, In The Alternative, To Alter Or Amend Judgment on September 19, 1991. The trial court

denied Winston & Strawn's Motion but ruled that the pre-trial settlement payments, although not a proper subject of Winston & Strawn's Motion, should operate as a partial satisfaction of HRP's judgment against Winston & Strawn.

Winston & Strawn filed a timely Notice of Appeal and HRP timely cross- appealed. We have jurisdiction pursuant to Ariz.Rev.Stat.Ann. ("A.R.S.") section 12-2101(B), (C), (E) and (F)(1) (1994).

II. ISSUES AND CROSS-ISSUES

A. Should the punitive damage award against Winston & Strawn be reversed or reduced?

1. Can Winston & Strawn be liable in punitive damages for the conduct of its partner Greenfield under a theory of respondeat superior?

2. Did Winston & Strawn proximately cause HRP's compensatory damages after March 1, 1981?

3. Was there clear and convincing evidence of Greenfield's evil mind?

4. Did the trial court's post-trial review of the punitive damage award satisfy due process standards?

5. Did the trial court abuse its discretion in denying Winston & Strawn a remittitur?

B. Did the trial court err in ruling that, as a matter of law, Winston & Strawn assumed CG&I's contingent tort liability?

C. Did the trial court improperly instruct the jury on the applicable negligence standard?

D. Was HRP entitled to prejudgment interest?

E. Did the trial court err in crediting, as partial satisfaction of the jury's award against Winston & Strawn,

settlement payments received by HRP prior to trial from CG&I and Greenfield?

III. DISCUSSION

A. Punitive Damages

1. *Vicarious liability*

The trial court recognized that "the award of punitive damages . . . against Winston & Strawn was based solely upon a theory of respondeat superior. There was no claim that Winston & Strawn acted negligently or punitively other than through the actions of Greenfield." Winston & Strawn argues that under Arizona law, a wholly passive employer cannot be liable for punitive damages under the respondeat superior doctrine. We disagree and hold that Arizona's partnership statutes and common law permit punitive damages to be awarded vicariously against Winston & Strawn for acts that Greenfield performed in the ordinary course of the partnership's business.

Arizona's legislature has adopted the Uniform Partnership Act which provides in part:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership . . . loss or injury is caused to any person, not being a partner in the partnership, or *any penalty is incurred*, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

A.R.S. § 29-213 (1989) ("UPA section 13") (emphasis added). Winston & Strawn contends that this section provides vicarious liability only for compensatory damages, and that it is silent on the issue of punitive damages. This contention overlooks the statute's explicit imposition of vicarious liability for "any penalty." Although Arizona's courts have never squarely addressed whether UPA section 13's reference to "any penalty" includes punitive damages, this court has interpreted the statute to impose vicarious

liability on partners for damages that are punitive in nature. *Ayres* v. *Red Cloud Mills, Ltd.*, 167 Ariz. 474, 476 n. 2, 808 P.2d 1226, 1228 n. 2 (App.1990) (affirming award of treble damages for unpaid wages against limited partnership and its general partner). Moreover, interpreting UPA section 13 to impose vicarious punitive damages liability on partners is consistent with the general law of partnership as noted by authoritative commentators and the *Restatement*.[6] Contrary to Winston & Strawn's contentions, UPA section 13's "any penalty" language contemplates the imposition of vicarious liability for punitive damages on partners.

Winston & Strawn next argues that UPA section 13's "any penalty" language is too ambiguous, and therefore UPA section 13 has not supplanted Arizona's common law on the vicarious imposition of punitive damages. *Wyatt* v. *Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) ("If the legislature fails to clearly and plainly manifest an intent to alter the common law, the common law remains in effect."). Winston & Strawn notes that other jurisdictions that have referred to UPA section 13 in upholding a partnership's vicarious liability for punitive damages have done so because UPA section 13 is consistent with their common law.[7] In other states where the common law has rejected

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[6] *See Bromberg & Ribstein On Partnership* § 4.07 (1991) ("Punitive damages have been held recoverable against the partnership, as long as the act was committed in the ordinary course of the partnership business. This is consistent with the provision in U.P.A. § 13 for partnership liability for 'any penalty' to the same extent as the acting partner and with corporate liability for punitive damages."); Scott Rowley, *1 Rowley On Partnership* § 13.1, at 373 (2nd ed. 1960); Restatement (Second) of Agency, ch. 7, Scope Note at 454 (1958) ("[For the purpose of imposing punitive damages], the conduct of any member of a partnership . . . can be treated as the conduct of a principal.").

[7] *See Meleski* v. *Pinero Int'l Restaurant, Inc.*, 47 Md.App. 526, 424 A.2d 784, 794 (1981) (holding that a jury instruction based on UPA § 13 was proper because Maryland's common law allowed vicarious punitive

vicarious liability for punitive damages, courts have not held partnerships vicariously liable despite that state's adoption of UPA section 13.[8]

Winston & Strawn's argument in this respect is inconsequential because there is no conflict between UPA section 13 and Arizona's common law. Arizona's courts have long held that a business may be vicariously liable in punitive damages for acts an employee commits in furtherance of the business and within the scope of employment. *Western Coach Corp.* v. *Vaughn*, 9 Ariz.App. 336, 338, 452 P.2d 117, 119 (1969) (citing *Southern Pac. Co.* v. *Boyce*, 26 Ariz. 162, 223 P. 116 (1924)).

Winston & Strawn asserts that recent appellate decisions have eroded the *Vaughn/Boyce* rule allowing respondeat superior liability for punitive damages, and that Arizona has now adopted the Restatement rule which requires a showing of some fault by the employer or that the employee served in a managerial capacity.[9] *See Wiper* v. *Downtown Dev. Corp.*, 152 Ariz. 309, 732 P.2d 200 (1987); *Jacobson* v. *Superior*

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liability against partners); *Rogers* v. *Hickerson*, 716 S.W.2d 439, 447 (1986). *But see Mulle* v. *Scheiler*, 484 So.2d 47, 48 (Fla.Dist.Ct.App. 1986) (citing Florida's version of UPA § 13 to uphold punitive damage award against entire partnership where two partners actively participated in fraud and misrepresentation; no discussion of common law rule).

[8] *See In re WPMK Corp.*, 59 B.R. 991 (Bankr.D.Haw.1986); *Husted* v. *McCloud*, 450 N.E.2d 491 (Ind.1983).

[9] Restatement (Second) of Torts § 909 (1979) provides: Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act. *See also* Restatement (Second) of Agency § 217 C (1957).

Court, 154 Ariz. 430, 743 P.2d 410 (App.1987); *White* v. *Mitchell*, 157 Ariz. 523, 759 P.2d 1327 (App.1988); *Walter* v. *Simmons*, 169 Ariz. 229, 818 P.2d 214 (App.1991); *Wyatt*, 167 Ariz. at 281, 806 P.2d at 870. Winston & Strawn has misread these cases.

On this point the dissent raises the "issue" of whether Greenfield was a "managerial agent" of Winston & Strawn and then admits that the issue was not litigated in the trial court and would only become relevant if Arizona adopted Restatement of Torts (Second), section 909, which it has not. In its opening statement, Winston & Strawn proclaimed:

> And I'll make the deal with you right now if you think he [Greenfield] lacks integrity and tried to prefer one client over the other and did so and hurt HRP and Shapiro, find against him. Find against Winston & Strawn.

The position taken by Winston & Strawn at trial and the position taken by it on appeal and apparently accepted by the dissent are irreconcilable. The "managerial agent" issue does not comport with Arizona law and the trial court instructed the jury that Winston & Strawn was responsible as a matter of law for any acts committed by CG&I after July 1978.

In *Wiper*, the Arizona Supreme Court accepted review "to clarify the relationship between punitive damages and the doctrine of respondeat superior." 152 Ariz. at 310, 732 P.2d at 201. The court reaffirmed the *Vaughn/Boyce* rule: "Arizona has specifically rejected the Restatement view in favor of a rule allowing punitive damages against an employer for acts of its employees 'so long as committed in the furtherance of the employer's business and acting within the scope of employment.'" *Id.* (quoting, *Vaughn*, 9 Ariz.App. at 338-39, 452 P.2d at 119-20). *Wiper* held that "an award of punitive damages against an employer is improper where no punitive damages have been awarded against the employee and the employer's liability is based solely upon the doctrine

of respondeat superior [instead of on the employer's own wrongful conduct]." *Id.* at 312, 732 P.2d at 203. In other words, where no defendant's actions merit punitive damages, none should be assessed. Accordingly, the court reversed a punitive damages award against an employer where the jury did not find that the employee's conduct warranted punitive damages. *Id.* Contrary to Winston & Strawn's reading, *Wiper* does not prohibit punitive damages against an employer when, as in the present case, a jury concludes that the employee's acts warranted punitive liability.

Nor do the three decisions of this court that Winston & Strawn cites change Arizona's law. *Jacobson* was not a scope and course of employment case, but rather involved the family purpose doctrine which imputes liability for a child's negligent operation of a vehicle to the child's parents. In holding that a negligent driver's parents could not be punitively liable, we distinguished the family purpose doctrine from the respondeat superior doctrine. We reasoned that vicarious punitive liability is justified under respondeat superior because "an employer receives some economic benefit from the employee's labor and specifically defines for the employee the scope of employment." 154 Ariz. at 432, 743 P.2d at 412. We noted in dicta that our supreme court might adopt the *Restatement* view in the future, but that respondeat superior remained Arizona's law. *Id.*

In *White* v. *Mitchell* the jury was instructed that to be liable in punitive damages, the employer must have "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." 157 Ariz. at 527, 759 P.2d at 1331. We reversed the jury's punitive damages award against the employer because there was not sufficient evidence to support this theory of liability. *Id.* at 529, 759 P.2d at 1333. The employer's potential liability under a theory of respondeat superior was not an issue in the case, and the decision did not cite the Restatement's sections regarding vicarious liability. Likewise, in *Walter* v. *Simmons*

we did not reach the issue of a principal's vicarious liability for its agent's conduct because there was insufficient evidence to support a punitive damages award against the agent. 169 Ariz. at 240, 818 P.2d at 225.

Nor does the supreme court's decision in *Wyatt* mean that Arizona has rejected the *Vaughn/Boyce* rule and adopted the Restatement view. *Wyatt* held that clients whose attorney filed a groundless *lis pendens* notice could not be held liable for statutorily authorized damages that were punitive in nature where the clients had no knowledge and did not consent to the attorney's action. 167 Ariz. at 287, 806 P.2d at 876. Although some of *Wyatt*'s language suggests a shift to the Restatement view,[10] *Wyatt* confirms that the common law allows punitive liability against a principal for the conduct of its agent without any showing of the principal's evil mind. The court declined to apply common law agency principles to allow recovery from unknowing clients because the applicable statute, A.R.S. section 33-420(A) (providing a penalty for filing a groundless *lis pendens*), abrogates Arizona's common law. 167 Ariz. at 286, 806 P.2d at 875. The court reasoned that unlike the common law, the statute requires scienter on the part of the client before the client can be punished for the attorney's acts. *Id.* at 286-87, 806 P.2d at 875-76.

To summarize, under Arizona's version of UPA section 13 and our common law doctrine of respondeat superior, Winston & Strawn can be vicariously liable in punitive damages for acts that its partner Greenfield performed in the ordinary course of the partnership's business. Arizona has not adopted the Restatement view requiring some employer participation or acquiescence in the employee's acts or that

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[10] "Agency principles restrict recovery to actual damages unless some participation, or at least acquiescence, is shown on the part of the principal." 167 Ariz. at 286, 806 P.2d at 875 (citing the Restatement (Second) of Agency) § 217(C) (1958)).

the employee was a manager of the employer.[11] This court recently upheld a punitive damage award against an employer who claimed it was unaware of its employee's acts. *Hooper* v. *Truly Nolen of America, Inc.*, 171 Ariz. 692, 832 P.2d 709 (1992). We said that a "[p]laintiff may prove entitlement to punitive damages via a number of factors, no single one of which is exclusive. The primary consideration is the reprehensibility of conduct and severity of harm." 171 Ariz. at 694, 832 P.2d at 711. Even the dissent agrees that Greenfield's conduct was reprehensible and that the harm to HRP was severe.

2. *Did Winston & Strawn proximately cause HRP's compensatory damages after March 1, 1981?*

A plaintiff must be entitled to compensatory damages before being entitled to punitive damages. *Wyatt*, 167 Ariz. at 285, 806 P.2d at 874. To recover compensatory damages in a legal malpractice action the plaintiff must prove that but for the attorney's negligence, the prosecution or defense of the original action would have been successful. *Asphalt Engineers, Inc.* v. *Galusha*, 160 Ariz. 134, 136-37, 770 P.2d 1180, 1182-83 (App.1989). If there is any evidence which

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[11] Even if Arizona followed the Restatement view, Winston & Strawn could still be liable in punitive damages because it employed Greenfield in a managerial capacity and he managed HRP's case. Arizona defines a "managing agent," *inter alia*, as a person who is invested with general powers to exercise judgment and discretion in dealing with a firm's matters. *Slow Dev. Co.* v. *Coulter*, 88 Ariz. 122, 127, 353 P.2d 890, 893 (1960) (hotel manager was a managing agent). In the context of HRP's relationship with Winston & Strawn, Greenfield's actions were the actions of the firm. *See Davis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1222-23 n. 19 (8th Cir.1990) (investment firm was vicariously liable in punitive damages for brokers' conduct because brokers' held positions of trust and were responsible for managing clients' money); *Hatrock* v. *Edward D. Jones & Co.*, 750 F.2d 767, 771-72 (9th Cir.1984) (broker in securities partnership acted in a managerial capacity where he had complete authority to act in all client matters).

would permit reasonable jurors to make such a finding, proximate causation is a jury question. *Tennen* v. *Lane*, 149 Ariz. 94, 97, 716 P.2d 1031, 1034 (App.1985). The jury views the first suit — "the case within the case" — from the standpoint of what a reasonable judge or jury would have decided but for the attorney's negligence. *Molever* v. *Roush*, 152 Ariz. 367, 375, 732 P.2d 1105, 1113 (App.1986); *Phillips* v. *Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986).

Winston & Strawn contends there is no evidence that HRP sustained compensatory damages due to Greenfield's conduct after he joined the firm on March 1, 1981. By then, Winston & Strawn argues, HRP had already sustained all its damages stemming from the Form-Eze litigation because the Special Master announced on December 8, 1980, his preliminary findings that HRP and Chanen were jointly and severally liable. Winston & Strawn argues there was nothing it could have done after March 1, 1981, to relieve HRP of liability to Form-Eze and Inryco.

Viewing the record in the light most favorable to upholding the jury's verdict, we conclude there is substantial evidence that Winston & Strawn proximately caused HRP to sustain actual damages in the Form-Eze litigation. The evidence included the AIA contract which arguably could have provided HRP with valid defenses against Form-Eze and Inryco and cross-claims against Chanen. According to Greenfield, the Special Master's findings of December 8, 1980, were only tentative and "preliminary." The Special Master requested additional briefing, and the parties still had an opportunity to change the outcome of the case. Winston & Strawn, through Greenfield, represented HRP for more than six months *before* the Special Master entered his final report. An expert witness for HRP testified that during this period, Greenfield's conflict should have been disclosed and Winston & Strawn should have moved the Special Master to re-open the evidence to allow HRP to advance its defenses

and cross-claims under the AIA contract. Instead, Winston & Strawn, through Greenfield, persisted in arguing that Chanen should not be held liable because Chanen was the disclosed agent of HRP. Thus, the jury could have reasonably concluded that but for Winston & Strawn's legal malpractice from March 1 to September 22, 1981, HRP could have significantly reduced its liability in the Form-Eze litigation.

Another source of HRP's compensatory damages is the attorneys' fees it paid in the Form-Eze litigation. Unaware of Greenfield's fundamental conflict of interest, HRP paid Winston & Strawn's fees through advances from Arizona Title. After learning of the conflict, HRP hired independent counsel in an attempt to correct Greenfield's errors and omissions. The jury properly awarded these amounts as part of HRP's actual damages, and these damages satisfy the predicate requirement for an award of punitive damages. *See Asphalt Engineers*, 160 Ariz. at 137, 770 P.2d at 1183 (fees paid to negligent attorney and a second attorney who performed work that negligent attorney had failed to perform were part of legal malpractice plaintiff's actual damages).

The dissent argues that the damage to HRP was done before March 1, 1981. After the Special Master had ruled on liability, Greenfield still had a conflict of interest. While Greenfield probably wanted to keep damages as low as possible for the favored client — Chanen, HRP continued to be injured by Greenfield and Winston & Strawn. HRP, through Arizona Title, was still paying legal fees to Winston & Strawn for Greenfield's non-representation — fees that HRP would undoubtedly have refused to pay had they then known of Greenfield's duality. Indeed these legal fees were a recognized part of HRP's compensatory damages. Furthermore, had Greenfield made HRP aware of the situation, HRP could have retained another firm to attempt to change the ruling of the Special Master as to HRP based on Greenfield's failure to provide HRP with a legitimate defense.

Contrary to the dissent's position, there was ample justification for vicarious liability after March 1, 1981, as to Winston & Strawn. After all, Greenfield brought, as part of his book of business, two major clients to Winston & Strawn — HRP and Chanen. Winston & Strawn benefited accordingly by collecting substantial legal fees from both.

3. Was there sufficient evidence of Greenfield's evil mind?

To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an "evil mind." *Thompson* v. *Better-Bilt Aluminum Prod. Co.*, 171 Ariz. 550, 556-57, 832 P.2d 203, 209-10 (1992); *Rawlings* v. *Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986); *Linthicum* v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-32, 723 P.2d 675, 680-81 (1986). A defendant acts with the requisite evil mind when he intends to injure or defraud, or deliberately interferes with the rights of others, "consciously disregarding the unjustifiable substantial risk of significant harm to them." *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680; *Gurule* v. *Illinois Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987). Important factors to consider when deciding whether a defendant acted with an evil mind include (1) the reprehensibility of defendant's conduct and the severity of the harm likely to result, (2) any harm that has occurred, (3) the duration of the misconduct, (4) the defendant's awareness of the harm or risk of harm, and (5) any concealment of it. *Thompson*, 171 Ariz. at 556, 832 P.2d at 209. The plaintiff may meet the clear and convincing standard by either direct or circumstantial evidence which persuades the jury of the high probability of the defendant's evil mind. *Id.* at 557, 832 P.2d at 210. This court must affirm a jury's award of punitive damages if any reasonable view of the evidence would satisfy the clear and convincing standard. *Id.* at 557-58, 832 P.2d at 210-11; *Rhue* v. *Dawson*, 173 Ariz. at 232, 841 P.2d at 227.

Winston & Strawn attacks the jury's $3 million punitive damages award by arguing that there was no substantial evidence of malpractice by Greenfield, let alone "evil mind." Under Winston & Strawn's view of the evidence, Greenfield vigorously asserted HRP's "best defense" that HRP was not liable because Form-Eze had breached its contract. That the Special Master disagreed with Greenfield's theory is not evidence of legal malpractice or of Greenfield's "evil mind." Winston & Strawn further argues that Greenfield fully revealed his "disclosed agent" strategy to HRP's Barry Shapiro at the beginning and throughout the lawsuit, and that Shapiro did not object. Winston & Strawn claims that Greenfield raised the issue of whether HRP should have separate counsel on several occasions. Lastly, Winston & Strawn contends that Greenfield had no motive to harm HRP because he socialized with the Shapiro family and had previously done legal work for them.

Winston & Strawn's argument overlooks several important facts which the jury did not overlook. There is clear and convincing evidence that in representing both HRP and Chanen, Greenfield consciously disregarded HRP's rights under the AIA contract and exposed HRP's partners to unjustifiable risks of personal liability. Greenfield never explained to HRP how the AIA contract provided potential defenses to Form-Eze's claims and rights of indemnification from Chanen. Instead, when he answered Form-Eze's complaint, Greenfield erroneously admitted a fact that Form-Eze had not alleged, namely, that Chanen was HRP's disclosed agent. Greenfield knew this admission could shift any potential liability for Chanen's breach of contract to HRP. Contrary to Form-Eze's theory that Chanen was primarily liable, Greenfield persistently argued that any liability should fall on HRP, not Chanen. By June 1981, Greenfield knew from the Special Master's preliminary findings and Form-Eze's proposed judgment that Chanen and HRP faced a serious risk of a $3.6 million liability. Yet

Greenfield sent an admittedly inexperienced and possibly unprepared associate to the post-trial damages hearing. This indifference to exposure is consistent with Greenfield's opinion to Chanen's auditors that he had "a significant chance of using the agency relationship to ultimately protect Chanen," i.e., that Greenfield could shift all liability to his other client, HRP.

There is also clear and convincing evidence that Greenfield had a motive to sacrifice HRP in order to protect Chanen. HRP filed for bankruptcy at approximately the same time that Greenfield assured Form-Eze's counsel that he had resolved any conflict arising from the joint representation of HRP and Chanen. HRP was struggling to pay its legal bills and had lost its only significant asset, the hotel, in a foreclosure sale. Greenfield recommended that HRP retain separate counsel not because of the conflict in the joint representation, but because of HRP's bankruptcy. In contrast to HRP, Chanen was the third or fourth largest construction company in Arizona and generated $48,000 in legal fees for Greenfield's firm during 1980. Greenfield was on Chanen's board of directors. In addition, there is clear and convincing evidence that Greenfield actively concealed his efforts throughout the Form-Eze litigation. From the outset, Greenfield was aware of the conflict between HRP and Chanen; but he never disclosed the conflict to HRP and never obtained a waiver. Greenfield did not communicate with HRP from September 1979 to February 1982. Greenfield waited five months after the Special Master's decision to inform HRP's partners that they were liable for a $3.6 million judgment. Even then, Greenfield had a messenger deliver this devastating news while he left town.

Based upon this evidence, the jury's finding that Greenfield acted with an evil mind is reasonably supported. *See Elliott* v. *Videan*, 164 Ariz. 113, 791 P.2d 639 (App.1989) (punitive damages were appropriate where attorney had conflict of interest, concealed it from his client, and acted to

benefit other clients at first client's expense); *Asphalt Engineers*, 160 Ariz. at 137, 770 P.2d at 1183 (affirming award of punitive damages against attorney who breached ethical duties to his client and concealed his misconduct).

4. Post-trial review of the punitive damage award under Due Process standards.

"A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Honda Motor Co.* v. *Oberg*, __ U.S. __, __, 114 S.Ct. 2331, 2342, 129 L.Ed.2d 336 (1994). Due process requires reasonable constraints on a jury's discretion to impose punitive damages, including post-verdict judicial review to ensure that the award is not excessive. *Id.* at __, 114 S.Ct. at 2341; *see also Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20, 111 S.Ct. 1032, 1044, 113 L.Ed.2d 1 (1991). Winston & Strawn complains that the punitive damages award violates due process because the trial court did not conduct a full post-trial review applying all the criteria discussed in *Haslip*.

In *Haslip*, the Supreme Court held that Alabama's method for awarding and reviewing punitive damages "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders." 499 U.S. at 22, 111 S.Ct. at 1045. In Alabama, the trial court instructs jurors that punitive damages are meant to punish and deter, and to consider the character and the degree of the wrongful conduct. *Id.* at 19, 111 S.Ct. at 1043. After the verdict, the trial court must state on the record its reasons for upholding or reducing the jury's award. *Id.* at 25, 111 S.Ct. at 1047. Then Alabama's appellate courts ensure that the punitive award is reasonable by considering several factors:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that

> actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21-22, 111 S.Ct. at 1045.

Contrary to Winston & Strawn's assertions, *Haslip* does not require that every state's trial and appellate courts conduct a detailed review of punitive damage awards identical to Alabama's review. *Haslip* declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18, 111 S.Ct. at 1043. Rather, "[a]s long as the discretion [to award punitive damages] is exercised within reasonable constraints, due process is satisfied." *Id.* at 20, 111 S.Ct. at 1044.

Arizona's method for imposing punitive damages provides several procedural protections to assure that an award of punitive damages is justified and reasonable. *Hawkins* v. *Allstate Ins. Co.*, 152 Ariz. 490, 504, 733 P.2d 1073, 1087, *cert. denied*, 484 U.S. 874, 108 S.Ct. 212, 98 L.Ed.2d 177 (1987). The plaintiff must survive a motion for a directed verdict, the jury must exercise its discretion to award punitive damages, the verdict is subject to post-trial motions and review by the trial judge, and the judgment is subject to appeal. *Id.* Then this court examines allegedly excessive punitive damage awards applying criteria very similar to those applied in *Haslip*: (1) the proportionality of the award to the wrongdoer's financial position to ensure that

the goals of punishment and deterrence are served without financially devastating the defendant; (2) the reprehensibility of the defendant's conduct, including the duration of the misconduct, the defendant's awareness of the risk of harm, and any concealment; and (3) the profitability to the defendant of the wrongful conduct. *Hawkins*, 152 Ariz. at 497-502, 733 P.2d at 1080-85. These procedural protections have a real effect in practice; Arizona's courts do not hesitate to overturn excessive or inadequate punitive damage awards. *See Carter-Glogau Lab. Inc.* v. *Construction Laborers' Local 383*, 153 Ariz. 351, 358, 736 P.2d 1163, 1170 (App.1987) (holding that trial court properly remitted jury's punitive damage award from $600,000 to $200,000); *Maxwell* v. *Aetna Life Ins. Co.*, 143 Ariz. 205, 218-19, 693 P.2d 348, 361-62 (App.1984) (remanding for new trial where jury passion and prejudice produced inadequate $1 punitive damage award).

Winston & Strawn has received full due process on the question of punitive damages. The trial court's Recommended Arizona Jury Instruction ("RAJI") for punitive damages, which required HRP to establish Greenfield's evil mind by clear and convincing evidence, restricted the jury's discretion even more than the instructions the Supreme Court approved of in *Haslip* and *TXO Production Corp.* v. *Alliance Resources Corp.*, __ U.S. __, __, 113 S.Ct. 2711, 2723, 125 L.Ed.2d 366 (1993) (plurality opinion).[12] The more rigorous clear-and-convincing standard "constrain[s] the jury's discretion, limiting punitive damages to the more egregious cases."

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[12] The *Haslip* jury was instructed that it could award punitive damages if it was "reasonably satisfied from the evidence" that the defendant committed fraud. 499 U.S. at 6 n. 1, 111 S.Ct. at 1037 n. 1. The West Virginia jury in *TXO* was instructed to apply a preponderance-of-the-evidence standard. __ U.S. at __ n. 29, 113 S.Ct. at 2723 n. 29.

Haslip, 499 U.S. at 58, 111 S.Ct. at 1064 (O'Connor, J., dissenting).[13]

Winston & Strawn received a full hearing on its Motion For New Trial. The trial court first found that clear and convincing evidence supported the award of punitive damages. Then, regarding Winston & Strawn's contention that the punitive damages award was excessive, the court ruled:

> Although the amount of punitive damages awarded is large, based on the evidence presented concerning the financial worth of the Defendant, the amount can not be said to be indicative of passion or prejudice, but [based] upon the jury's consideration of the instruction and the purpose for which punitive damages are assessed.

The trial court's post-verdict review satisfied due process. *TXO Prod. Corp.*, ___ U.S. at ___, 113 S.Ct. at 2724 (due process satisfied where defendant received adequate hearing on post-verdict motion and judge indicated agreement with jury's verdict, even though judge did not explain basis for denial of motion on the record).

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[13] We note that the Supreme Court recently held that Oregon's clear-and-convincing standard of proof and detailed jury instructions alone do not adequately constrain a jury's discretion to award punitive damages; punitive awards must be subject to judicial review. *Honda Motor Co.*, --- U.S. at ----, 114 S.Ct. at 2331. Oregon was unique in abrogating the common law's protection against arbitrary punitive damage awards through judicial review. *Id.* at ----, 114 S.Ct. at 2338-39. "No Oregon court for more than half a century [had] inferred passion and prejudice from the size of a damages award, and no court in more than a decade [had] even hinted that courts might possess the power to do so." *Id.* at ----, 114 S.Ct. at 2339.

In contrast, Arizona provides detailed and meaningful post-verdict judicial review in its trial and appellate courts. *See Hawkins*, 152 Ariz. at 501-04, 733 P.2d at 1084-87; *Carter-Glogau Lab.*, 153 Ariz. at 358, 736 P.2d at 1170; *Maxwell*, 143 Ariz. at 218-19, 693 P.2d at 361-62.

On appeal, we have considered Winston & Strawn's arguments in detail and reviewed the allegedly excessive punitive damages award under *Hawkins'* criteria. The award is proportionate to Winston & Strawn's financial position; it represents approximately 3.1 percent of the firm's gross revenues for 1990. The record supports the jury's determination that for almost a year Winston & Strawn, through Greenfield, consciously disregarded its client's interests, tried to shift all liability for a potential $3.6 millon judgment from a more favored client to HRP, and concealed this conduct from HRP. The punitive damage award is less than half of what HRP requested, less than three times HRP's compensatory damages, and significantly less than the liability that Greenfield sought to have HRP bear.[14] We conclude that the award serves the goals of punishment and deterrence without financially devastating Winston & Strawn.

5. Is Winston & Strawn entitled to a remittitur?

Winston & Strawn requests remittitur of the punitive damages award, arguing that HRP inflamed the jury during its closing argument with references to the AzScam and savings and loan scandals, and characterizations of Winston & Strawn as "huge," "powerful," and "rich."[15] The trial

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[14] *Cf. TXO Prod. Corp.*, __ U.S. at __, 113 S.Ct. at 2721-23 (holding that a punitive damages award that was 526 times greater than the actual damages award was nonetheless reasonable in light of the potential for harm from defendant's conduct, defendant's wealth, and profits defendant hoped to achieve); *Haslip*, 499 U.S. at 23, 111 S.Ct. at 1046 (upholding punitive damages award four times greater than the amount of compensatory damages).

[15] Winston & Strawn's counsel made similar remarks about HRP throughout the trial. His opening statement referred to one of HRP's partners as a "multi-millionaire." During testimony, when referring to another of HRP's partners, he stated "They had money. They had a lot of money. They're multi-millionaires, aren't they?" and "[H]e could walk in this courtroom and write a check for a million dollars on anything he

court specifically concluded that the verdict against Winston & Strawn did not result from passion or prejudice, but rather from the jury's consideration of clear and convincing evidence of an evil mind and the purposes of punitive damages.

"Where the trial court has refused to interfere with the jury's determination of damages, this court cannot interpose its own judgment on the issue unless convinced that the verdict is so excessive as to suggest passion or prejudice." *Nienstedt* v. *Wetzel*, 133 Ariz. 348, 357, 651 P.2d 876, 885 (App.1982). We accord the greatest possible discretion to the trial court because, like the jury, it has had the opportunity to hear the witnesses and observe the demeanor of witnesses. *Carter-Glogau Lab.*, 153 Ariz. at 358, 736 P.2d at 1170.

We hold that the trial court did not abuse its discretion when it denied Winston & Strawn's request for remittitur. As discussed above, the *Hawkins* factors fully support the verdict and the trial court's decision not to interfere with it.

B. Did Winston & Strawn Assume CG&I's Contingent Tort Liability?

Prior to trial, Winston & Strawn filed a consolidated Motion For Partial Summary Judgment And Motion In Limine requesting a ruling that it had no liability for CG&I's acts in the Form-Eze case prior to the merger on March 1, 1981, and to exclude evidence of CG&I's pre-merger acts. Because the Motion For Partial Summary Judgment was filed too late, the trial court ordered *sua sponte* that it would consider only the Motion In Limine. However, HRP argued that the summary judgment issues were inextricably intertwined with the evidentiary issues; the trial court permitted

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wanted to." In his closing argument, he characterized Sam Shapiro as "one of the most influential, one of the richest, one of the most powerful men in the state of Arizona," and HRP as "Some very rich people [who] decided to build a hotel . . . with [the] help of their very rich friend to make a lot of money."

HRP to file a response to the consolidated motion. The trial court denied the Motion In Limine holding that "pursuant to principles of partnership law and under the agreement of the parties, Winston & Strawn is liable for any alleged malpractice for which the Craig, Greenfield & Irwin partnership had liability." At the close of the evidence, the court instructed the jury that Winston & Strawn was responsible as a matter of law for any acts committed by CG&I after July 1, 1978.

Winston & Strawn argues that under the Uniform Partnership Act ("UPA"), A.R.S. sections 29-201 to -244 (1989), Winston & Strawn was only liable for those CG&I liabilities which it contractually assumed. According to Winston & Strawn, whether it assumed liability for HRP's malpractice claim was a factual issue which should have gone to the jury. We disagree.

Winston & Strawn's consolidated motion asserted: "On March 1, 1981, the firms of Craig, Greenfield & Irwin and Winston & Strawn merged their practices in Phoenix, Arizona under the name 'Winston & Strawn'. . . ." Legally, three things happened upon the merger. First, the "old" Winston & Strawn dissolved when it accepted the incoming CG&I partners. *See* A.R.S. §§ 29-229, 231; *Johnson* v. *Hill*, 1 Ariz.App. 290, 291, 402 P.2d 225, 226 (1965). Second, the "old" CG & I dissolved when it accepted the incoming Winston & Strawn partners. *See id.* Third, a "new" partnership known as Winston & Strawn was created and continued the business of both of the old partnerships. *See id.* Neither CG&I nor the old Winston & Strawn liquidated their affairs before dissolving.

The dispositive issue is the extent of the new combined partnership's responsibility for the liabilities of the dissolved partnerships, the former Winston & Strawn and the former CG&I. Winston & Strawn asserts that A.R.S. section 29-241(D) ("UPA section 41(4)") shields it from liability for HRP's malpractice claim against CG&I because Winston &

Strawn did not promise to assume that liability. UPA section 41(4) provides:

> When all the partners . . . assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

The Official Comment provides that UPA section 41(4) "does not apply to the case where the third person or persons do not promise to pay the debts of the dissolved partnership. In that case the creditors of the dissolved partnership have no claim on the partnership continuing the business or its property . . . ." 6 U.P.A. § 41, at 513 (1969).

We conclude, however, that UPA section 41(4) is inapplicable to the CG&I — Winston & Strawn merger. UPA section 41(4) applies only when "*all* the partners . . . assign their rights in partnership property to one or more *third* persons." (emphasis added). Thus, on its face, this subsection applies only when none of the existing partners continues his association with the ongoing business. That is not what happened here. CG&I's partners simply continued their business under Winston & Strawn's name.

When a partnership such as CG&I dissolves "without liquidation of partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business." A.R.S. § 29-241(A) ("UPA section 41(1)"). The Official Comment to UPA section 41(1) explains that this subsection is intended to apply precisely to situations like the CG&I -- Winston & Strawn merger:

> The paragraph as a whole, as well as [the] entire section, is based on the opinion that when there is a continuous business carried on first by A, B, and C, and then by A, B, C and D, or by B or C . . . or by B, C, and D, without any liquidation of the affairs of A, B, [and] C,

> both justice and business convenience require that all the creditors of the business, irrespective of the exact grouping of the owners at the times their respective claims had their origin, should be treated alike, all being given an equal claim on the property embarked in the business.

6 U.P.A. § 41, at 512. In making the creditors of the first partnership creditors of the second, this subsection prevents an assignment of the first partnership's property from affecting the rights of the first partnership's creditors. *Id.* We hold that the trial court properly charged Winston & Strawn with CG&I's contingent tort liability under UPA section 41(1) because CG&I's affairs were not liquidated upon the merger.

C. Did The Trial Court Improperly Instruct The Jury On The Applicable Negligence Standard?

Winston & Strawn complains that the trial court erred by refusing a tendered instruction which articulated the causation element in the "but for" language from legal malpractice caselaw. *See Molever*, 152 Ariz. at 374, 732 P.2d at 1112 (in legal malpractice case "the client's recovery depends on a showing that 'but for' the alleged negligence of the attorney the injury complained of would not have occurred"); *Phillips* v. *Clancy*, 152 Ariz. at 418, 733 P.2d at 303. Winston & Strawn argues that the trial court obfuscated the jury's inquiry by stating that the jury need only find that malpractice was "a cause" of HRP's economic loss, and that it "helped" to produce the loss, and then stating that the jury must find that HRP's loss would not have happened "without" the malpractice. Winston & Strawn maintains that although it did not object at trial, the failure to properly instruct on the basic issue of proximate cause is fundamental error which cannot be waived. *See Trojanovich* v. *Marshall*, 95 Ariz. 145, 146, 388 P.2d 149, 150 (1963).

We hold that Winston & Strawn waived all but fundamental error by not objecting to the jury instruction. We further hold that if there was any error, it was not fundamental because the instruction gave the basic outline of the law on legal malpractice. *Bradshaw*, 157 Ariz. at 419-20, 758 P.2d at 1321-22 (objection to improper jury instruction on probable cause element in malicious prosecution was waived where defendant did not object to final form of instruction; instruction was not fundamental error because it gave basic outline of legal test). The trial court's instruction stated: "Malpractice causes economic loss if it helps to produce the loss and the economic loss *would not have happened without the malpractice*." (emphasis added). This emphasized language has the same meaning as the "but for" formulation, and it is the preferred instruction in negligence cases. *See* RAJI (Civil) Second Fault 2 (1991). Since legal malpractice is only a species of negligence, there is no special importance to the "but for" formulation.

D. Was HRP Entitled To Prejudgment Interest?

A party's entitlement to prejudgment interest depends on whether his or her claim is "liquidated." *Schade* v. *Diethrich*, 158 Ariz. 1, 14, 760 P.2d 1050, 1063 (1988). "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Id.* (quoting Charles T. McCormick, *Damages* § 54 (1935)). If a claim is liquidated, then prejudgment interest is a matter of right. *Id.*

Winston & Strawn argues that HRP's compensatory damages were not liquidated because the jury had discretion to hold Winston & Strawn liable for less than the whole amount of HRP's liability to Form-Eze and Inryco. The trial court instructed the jury that Winston & Strawn was only responsible for Greenfield's acts after July 1, 1978. Thus, Winston & Strawn argues, the jury could have found that some or all of HRP's liability to Form-Eze and Inryco was

caused by Greenfield prior to that date and that Winston & Strawn was not responsible for that liability.

This argument ignores the fact that although Winston & Strawn's liability for HRP's compensatory damages was disputed, the *amount* of those damages was not. "The mere fact that the parties dispute a claim does not defeat the allowance of interest." *La Paz County* v. *Yuma County*, 153 Ariz. 162, 168, 735 P.2d 772, 778 (1987); *see also Hall* v. *Schulte*, 172 Ariz. 279, 284, 836 P.2d 989, 994 (App.1992) (holding that derivative liability claim was liquidated even though derivative liability was disputed). The verdict amount comprised three exact amounts: two types of HRP's attorneys' fees and the amount that HRP paid on the judgment in the Form-Eze litigation. Once the jury decided that Winston & Strawn caused HRP's loss in the Form-Eze litigation, the amount of Winston & Strawn's liability to HRP was certain. Therefore we affirm the trial court's award of prejudgment interest.

E. Did The Trial Court Err In Crediting, As Partial Satisfaction Of The Jury's Award Against Winston & Strawn, Settlement Payments Received By HRP Prior To Trial From CG&I And Greenfield?

Months prior to trial, HRP reached a settlement with CG&I and Greenfield, or more specifically, with their two malpractice insurers who provided coverage for the period before March 1, 1981, when CG&I merged with Winston & Strawn. HRP allocated $1 million of the settlement to punitive damages, and the remaining $500,000 to compensatory damages.

Winston & Strawn did not raise any credit issues between the May verdict and the September entry of final judgment, although it did raise other objections during this period. Winston & Strawn's first claim to a credit appeared in its post-judgment Motion For New Trial Or, In The Alternative, To Alter Or Amend Judgment. The trial court ruled that

although the credit issue was not properly a part of the motion, the pre-trial settlement payments operated as partial satisfactions of the compensatory and punitive damage awards against Winston & Strawn.

1. Credit against the compensatory award

On cross-appeal, HRP argues that when a co-defendant makes a payment on a plaintiff's claim prior to the entry of the final judgment, a non-settling defendant who knows of that payment must advance its request for credit before the judgment is entered. Under the unique facts in this case we cannot agree and therefore we affirm the trial court's grant of credit on the compensatory damages.

In Arizona, a joint tortfeasor is entitled to have the amount of another joint tortfeasor's settlement applied in reduction of the plaintiff's claim. A.R.S. § 12-2504 (1994); *Egurrola* v. *Szychowski*, 95 Ariz. 194, 198, 388 P.2d 242, 245 (1964). Winston & Strawn, however, sought to have HRP's judgment, not HRP's underlying claim, reduced by the co-defendants' settlement payments.[16]

> Public policy demands that there be an end to litigation. The common good of society as a whole and of the litigants in particular, requires that there be an end to strife for the purpose of producing certainty as to individual rights and to promote dignity and respect for judicial proceedings.

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[16] Of course if a judgment is entered before a party becomes aware of facts which require a new trial or relief from the judgment, the party can bring appropriate post-judgment motions. Ariz.R.Civ.P. 59(a) (allowing for new trial when party discovers material evidence which could not have been discovered and produced at trial); Ariz.R.Civ.P. 60(c) (allowing for relief from judgment for mistake, inadvertence, surprise, newly discovered evidence, etc.).

Winston & Strawn does not dispute that it was fully aware of its co-defendants' pre-trial settlements, and it offers no explanation for its failure to request credit prior to the entry of judgment.

Lee v. *Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1950). Thus, a defendant requesting the court to apply the amount of another joint tortfeasor's payment to reduce the plaintiff's claim should do so before judgment is entered.

Winston & Strawn cites *American Home Assurance Co.* v. *Vaughn*, 21 Ariz.App. 190, 192, 517 P.2d 1083, 1085 (1974), for the proposition that it was entitled to wait until after the judgment was entered on HRP's claim before it sought credit for the codefendants' pre-trial settlement payments. In *Vaughn* a defendant against whom a judgment had been entered moved the trial court to reduce the judgment by an amount that settling co-defendants had paid the plaintiff before trial. Reversing the trial court's denial of the motion, this court held that "a settlement by one or more of the defendants is to be credited against any judgment rendered against the defendant who is held liable." *Id.* at 193, 517 P.2d at 1086.

We do not think that *Vaughn* is dispositive. *Vaughn* did not address whether a defendant's post-judgment motion to reduce damages comes too late, and apparently no one raised this issue. Moreover, the two Arizona Supreme Court cases which *Vaughn* cited in support of its holding actually indicate that a defendant must raise credit issues before the court enters the judgment. *See Adams* v. *Dion*, 109 Ariz. 308, 309, 509 P.2d 201, 202 (1973); *Egurrola*, 95 Ariz. at 198, 388 P.2d at 245. In *Dion*, the court's statement that any settlement amount "must be credited *on* any judgment received against the other [co-defendant]," 109 Ariz. at 309, 509 P.2d at 202 (emphasis added), suggests by its use of "on" instead of "against," that the judgment actually entered should reflect the appropriate reduction, and hence credit issues should be determined prior to judgment. In *Egurrola* the court explained that evidence of a co-defendant's settlement should not be presented to the jury, but that the credit issue should be addressed "after the jury has returned its verdict." 95 Ariz. at 198, 388 P.2d at 245. This suggests

that credit issues should be determined before the court enters judgment.

Our supreme court directly addressed this issue in *Evans* v. *Valley Radiologists Ltd.*, 127 Ariz. 177, 180, 619 P.2d 5, 8 (1980). In *Evans*, the defendant filed a post-judgment motion seeking credit for payments it had made to the plaintiff on the debt which had been litigated at trial. The supreme court held that the defendant's request for credit came too late: "[A]ppellant's failure to raise the issue before judgment was entered waived any right to a reduction in the amount of the judgment. . . ." *Id.* Like the defendant in *Evans*, Winston & Strawn sat on its right and did not seek credit until after the judgment was entered.

In this case we cannot apply this holding because the trial judge instructed the jury that they should determine the full amount of damages suffered by HRP and that she, as the trial judge, would prevent any "double recovery." The Settlement Agreement between HRP and CG&I and its partner Greenfield (or more specifically their two malpractice insurers) stated:

> Nothing in this Settlement Agreement shall release, waive or impair any claims, rights or causes of action HRP and the two insurers or any of them have now or may have in the future against Winston & Strawn, its individual partners and its professional liability insurer for the lawsuit.

It appears that the trial judge reasoned that the pre-trial settlements could be treated, pursuant to Rule 60(c)(5), as a partial satisfaction of the judgment entered against Winston & Strawn. Thus the trial judge conceptualized the final judgment which was against Winston & Strawn only, as being the same as a judgment, jointly and severally, against Winston & Strawn, Greenfield, and CG&I, so that pre-trial payments by CG&I and Greenfield amounted to partial satisfaction of what

the trial judge apparently believed to be a "joint and several" judgment. Rule 60(c)(5) provides:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

To apply Rule 60(c)(5) is to avoid a double recovery of the same damages in this case since the jury returned compensatory damages in the exact amount of $1,238,568, which was based "to the dollar" on the total amount HRP paid to satisfy the judgment entered against it in the Form-Eze litigation, plus attorneys' fees incurred.

We agree that the better practice would have been for Winston & Strawn to have pled the settlement as an affirmative defense pursuant to Rule 8(c), Arizona Rules of Civil Procedure. Winston & Strawn did not do so. However the judge instructed the jury to find the full amount of compensatory damages suffered by HRP and she would prevent any double recovery by virtue of the settlement. When HRP introduced a post-trial claim that Winston & Strawn was not entitled to an offset, the trial court observed:

> And frankly, I was really surprised to read that there was some claim that there was no entitlement to a credit because of a procedural problem on at least the half a million dollars that was received by plaintiffs to settle the compensatory damages claim against Greenfield and Craig, Greenfield and Irwin.
>
> * * * * * *
>
> I thought that this was just absolute that everybody understood and there was going to be no question that

> Mr. — that HRP can't recover twice under any circumstances, and that is in fact what the result would be if I don't apply the credit.

The trial court committed no error in keeping its promise to the jury and rejecting the claim by HRP in regard to the compensatory damages. This part of the cross-appeal is affirmed.

2. Credit against the punitive award

We reverse the credit for punitive damages. After the trial the trial court assumed that because the respondeat superior theory for Greenfield's conduct was the only basis for holding Winston & Strawn liable, any settlement payments for Greenfield's conduct reduced Winston & Strawn's liability. This assumption was wrong as a matter of law because punitive damages may be assessed against an employee and his employer, and even though the employer is liable only in respondeat superior, the employer will be liable for the separate assessment against it. *Wilson* v. *Riley Whittle, Inc.*, 145 Ariz. 317, 322, 701 P.2d 575, 580 (App.1984).

The trial court's assumption was also wrong as a matter of fact because the jury awarded punitive damages for Greenfield's post-March 1, 1981 conduct, while the pre-trial settlement was for Greenfield's pre-March 1, 1981 conduct. The jury was instructed that in deciding whether to award punitive damages against Winston & Strawn, "you may only consider the actions of Mr. Greenfield that took place after he joined Winston and Strawn on March 1, 1981." Thus, although the same person (Greenfield) committed all the wrongful acts, the settlement was for different conduct than the jury award. Therefore the trial court erred in crediting payment for one set of acts against the jury's award for another set of acts. Furthermore, the trial court had instructed the jury that it could assess punitive damages against Winston & Strawn for the actions of it and Greenfield occurring after March 1, 1981. We must assume on review

that the jury followed the instructions of the trial court. *Perkins* v. *Komarnyckyj*, 172 Ariz. 115, 834 P.2d 1260 (1992). In Post-Trial Orders the trial judge stated that she felt bound by respondeat superior to award punitive damages against Winston & Strawn, but that since the jury's award of punitive damages against Winston & Strawn was solely on the basis of respondeat superior, the court ordered that the $1 million HRP received in settlement of its punitive damage claims against Greenfield and CG&I would be credited against the punitive damages awarded against Winston & Strawn. However, the one satisfaction rule is inapplicable to punitive damage awards. The rule only applies to awards which *compensate* for injuries, not awards intended to deter and punish. Winston & Strawn accepted the benefit at trial of an instruction from the court that its punitive damage liability was limited solely to acts occurring *after* March 1, 1981. Moreover, Winston & Strawn also accepted the benefit of the trial court's ruling that its merger with CG&I did *not* result in the "new Winston & Strawn" assuming punitive damage liability for CG&I's and Greenfield's prior conduct.

The rationale of the one injury/one compensation principle is simply that the plaintiff is not entitled to be compensated twice for the same injury; in contrast, the purpose of a punitive damage award is to punish. Accordingly, the fundamental rationale of the credit rule is absent when punitive damages are involved. *Bosco* v. *Serhant*, 836 F.2d 271, 280-81 (7th Cir.1987).

The dissent makes oddly contradictory arguments — the first being that all damage done to HRP was done before March 1, 1981, and the second being that Winston & Strawn should get $1 million credit for damages which it did not cause under the dissent's theory. Before trial, the trial court expressed concern about a double recovery and advised the jury that she, as the judge, would see that no double recovery of the compensatory damages in favor of HRP occurred. She avoided the double recovery problem as to punitive damages

by instructing the jury that it could only find punitive damages against Winston & Strawn for acts occurring after March 1, 1981. Winston & Strawn assumed CG&I's contingent tort liability for compensatory damages purposes only.

As to the dissent's point regarding final argument, both parties in this case had very experienced, competent counsel who knew well what they were doing and what trial advocacy is all about. However, our standard of review as an appellate court is to consider the facts and all inferences in the light most favorable to sustaining the jury verdict and resulting judgment as we stated in the beginning of this opinion. There is no question that this trial judge did an excellent job with a very complex piece of litigation.

IV. CONCLUSION

We affirm the jury's award of compensatory and punitive damages to HRP. We also affirm the trial court's award of prejudgment interest. We affirm the trial court's grant of credit to Winston & Strawn for $500,000 pre-trial settlement payments by Greenfield and CG&I for HRP's compensatory damages. However, we reverse the trial court's grant of credit for $1 million against the jury's punitive damage award. Accordingly, we remand to the trial court for entry of judgment in accordance with this opinion. Pursuant to A.R.S. section 12-342, we award HRP its costs on appeal upon compliance with Rule 21, Arizona Rules of Civil Appellate Procedure. Finally, we direct the Clerk of this Court to send a copy of this opinion to the State Bar of Arizona Disciplinary Commission for its review.

GARBARINO, P.J., concurs.

NOYES, Judge, concurring in part, dissenting in part.

I concur in the decision to affirm the compensatory damages offset; in all other regards, I respectfully dissent. In my opinion, the $3 million punitive damages penalty

imposed on Winston & Strawn is both unconstitutional and unsupported by the evidence.

A. Punitive Damages Offset: I would reverse the punitive damages award. But if affirming, I would also affirm the punitive damages offset, for reasons explained by the trial court:

> There is no evidence upon which punitive damages could be independently assessed against Winston & Strawn for any conduct separate and apart from the conduct of Greenfield. In this Court's view by agreeing to accept $1 million in punitive damages from Greenfield, the Plaintiff is also required to credit that $1 million against the punitive damage award against Winston & Strawn. To allow recovery of the full $3 million would be allowing a double recovery of one-third of the punitive damages assessed because of Greenfield's conduct. The settlement effects a partial satisfaction of the punitive damages as well.

The reversal of the punitive damages offset gives HRP what the trial court regarded as a $1 million double recovery, and it penalizes Winston & Strawn $1 million more than the trial court had in mind when it denied the motion for remittitur. In light of these circumstances, I think it appropriate for counsel to request that the trial court reconsider the motion for remittitur.

B. Vicarious Liability: I agree that Arizona case law allows punitive damages for respondeat superior liability. I second the concerns expressed by the trial court regarding that law:

> While this Court has substantial doubts as to whether the purposes behind the award of punitive damages are served by the application of *respondeat superior*, particularly when the party whose conduct is the basis for the award of punitive damages is an experienced lawyer whose conduct is not subject to the same kind of supervi-

sion and close scrutiny as the conduct of many other types of employees, this Court is bound by appellate authority on this issue.

Winston & Strawn's argument that Arizona law should evolve to a position more in line with Restatement (Second) of Torts Section 909 (1979) is serious. What happened in this trial and appeal to Winston & Strawn is reason enough to reconsider Arizona law regarding vicarious liability for punitive damages.

If Greenfield was a "managerial agent" of Winston & Strawn, the partnership would be vicariously liable in punitive damages for his evil-minded conduct, even under Section 909. Whether Greenfield was a managerial agent, however, was never litigated; it was mooted by the trial court's directed verdict on vicarious liability. But the issue appears triable, if Section 909 becomes the law in Arizona.

C. Evidence: Assuming that the law allows punitive damages against Winston & Strawn here, the evidence does not support a $3 million penalty.

1. The damage was done before March 1, 1981: The trial court instructed the jury, "In deciding about punitive damages, you may only consider the actions of Mr. Greenfield that took place after he joined Winston & Strawn on March 1, 1981." (Although the start-date for compensatory damages was July 1, 1978, *none* of the parties complain about a March 1, 1981 start-date for punitive damages, so there is no issue on appeal about the correctness of that date.)

I submit that the record compels the conclusion that the evil-minded conduct of Greenfield had done its damage to HRP prior to March 1, 1981. True, Greenfield earned attorneys' fees after March 1, 1981, and can be faulted for certain behaviors after that date — such as the untimely and insensitive way in which he disclosed the Special Master's decision to HRP. But the real damage to HRP was done when the Special Master announced his liability verdict on

December 8, 1980 — three months *before* Greenfield joined Winston & Strawn.

The underlying lawsuit against HRP and Chanen was complex only in regard to damages. Liability turned on the testimony of one Chanen employee and one Form-Eze employee, and the question whether Chanen threw Form-Eze off the job on November 19, 1974. Trial was in March 1980 — one year *before* Greenfield joined Winston & Strawn. The Special Master was the Honorable R. Porter Murry, a retired superior court judge. On December 8, 1980, Judge Murry announced that he needed more help from counsel in calculating damages, but he ruled from the bench on liability.

The jury in the Winston & Strawn trial was read numerous stipulations of fact, and stipulation 45 provided: "On December the 8th, 1980, the Special Master stated at a hearing that he had found in favor of Form-Eze and Inryco against both Chanen and HRP." After that, the only question left unresolved — and it was a complicated question — was the amount of damages the Special Master was going to award Form-Eze and Inryco against *both* Chanen and HRP. The eventual award of massive damages resulted, not because Greenfield acted with an evil mind towards HRP, but because — for reasons later found by the district court to be in large part clearly erroneous — the Special Master found the Form-Eze and Inryco arguments on damages more persuasive than those of Greenfield and his associates on behalf of Chanen and HRP.

2. Greenfield's pro-Chanen contract defense failed: Greenfield has been faulted for arguing from the outset that Chanen was an agent and HRP was its disclosed principal and, therefore, any contract liability should be imposed solely on HRP. But the Special Master rejected this argument, the district court rejected it, and the Ninth Circuit rejected it. The district court adopted nearly all of the Special Master's liability findings and conclusions, including:

> 6. Chanen was acting as the agent of HRP when it negotiated and entered into the Equipment Lease and Labor Guarantee, and when it executed the Letter of Clarification. This agency relationship, however, was not disclosed to Form-Eze until after these agreements had been entered into.
>
> 35. As a result of Chanen unilaterally dismissing [Form-Eze] from the jobsite, the Labor Guarantee, including the Security Interest, was terminated as of November 19, 1974.
>
> 68. Since Chanen's agency was not disclosed as of the date on which the Form-Eze Equipment was leased, Chanen, or at Form-Eze's election, HRP is liable to Form-Eze for [contract damages].
>
> 78. The defendants' [Chanen and HRP] retention of the Inryco [formerly the Form-Eze] Equipment after July 30, 1975 was tortious, entitling Inryco under A.R.S. § 12-1301 *et seq.* to recover [tort damages].

3. HRP and Chanen were united in their tort defense: About eighty percent of the damages were tort damages for the wrongful detention of the forms. The Special Master awarded $3.6 million in damages, the district court reduced it to $800,000, and the Ninth Circuit raised it to $1.6 million. Of the Ninth Circuit award, the contract damages were about $20,000 to Form-Eze and about $290,000 to Inryco. The other $1.29 million was for wrongful detention of the forms, and fair market value of the forms.

There was much evidence that HRP was jointly liable with Chanen for the wrongful detention of the forms, and there was no evidence that Greenfield's evil-minded conduct after March 1, 1981 was a cause of HRP's tort liability. From the time of their *1975* detention, the forms were stored at a facility owned by an HRP partner. An August 6, *1975* letter from HRP (Barry Shapiro) to Chanen said, in part:

> [S]ubject to my talking to Art Greenfield when he returns, it would appear that the direction which we should pursue with Form-Eze is to continue to hold the forms at National Metals as a means of leverage in collecting at least some of the excess dollars which you figure they owe us.

One of the exhibits at trial was a "Letter Agreement" signed by Chanen and HRP on October 6, *1977*. This agreement provided that HRP would store the forms and that *HRP* would indemnify *Chanen* if it were later concluded that the detention of the forms was wrongful. (The agreement also provided that indemnification would not apply to damages attributable to the fault of Chanen.)

Another trial exhibit was a February 8, *1978* letter from Greenfield to HRP that began: "As you know, on numerous occasions in connection with this matter I have suggested that it would be more appropriate for the defendants other than Chanen Construction Company to be represented by separate counsel." The letter discussed the "disclosed agent" theory ("[I]t has always been the situation that Chanen Construction Company was sued as the agent of the disclosed principal, HRP Hotel Company. . . ."). The letter advised that Greenfield had been contacted by Inryco counsel with settlement overtures and that:

> It seems imperative that the issue of utilization of the forms and perhaps even settlement of the entire litigation be vigorously pursued at this time. Accordingly, I again most strongly urge that your representation in connection with this matter be undertaken by counsel who is more familiar with the various aspects of the HRP Hotel situation than I.

The point here is this: If there was malpractice by Greenfield regarding what he did or did not advise HRP to do with the forms, the malpractice affected Chanen and HRP equally, it was not done with an evil-minded favoring of

Chanen over HRP, and it was done long before March 1, 1981 — all of which means that there is no legal reason to penalize Winston & Strawn for that behavior.

4. HRP's final argument: During trial there was little mention of Winston & Strawn, until final argument. HRP's counsel, Robert A. Jensen, began his final argument by advising jurors that they *could* do nothing about the savings and loan scandals and they could do nothing about the AzScam scandal — except to pay higher taxes because of them — but they could do something about "one of the most powerful law firms in the country, Winston & Strawn." Regarding the gross revenues of Winston & Strawn, counsel said: "They're going to amaze you. They are rich and powerful." Counsel then referred for the first time in the trial to the Winston & Strawn financial statement (which was in evidence by stipulation) and advised that Winston & Strawn had over $97 million in gross revenues and that, if the jury were to impose, say, only $500,000 in punitive damages, "you're not even going to get their attention. They're not going to look up from their coffee. They're not going to rearrange their European vacations." Counsel then suggested penalizing Winston & Strawn one month's "wages," about $8 million. In rebuttal, counsel implored: "But please, I have watched all my life, representing plaintiffs as I do, the rich and the powerful get away with it. Don't let it happen here." Counsel closed with a suggestion that an award of punitive damages in the amount of "several million dollars" was appropriate.

HRP's call to arms against rich and powerful lawyers who "get away with it" has thus far succeeded with one Arizona jury and two Arizona courts — despite the fact that Winston & Strawn did nothing wrong. During argument on the motion for new trial, the trial court stated: "[E]verybody agreed that the only basis for punitive damages against Winston & Strawn was based on the conduct of Art Greenfield. It wasn't a claim that he was negligently hired or

retained or supervised . . . punitive damages were based exclusively on his conduct, correct, Mr. Jensen?" Jensen responded: "I believe that's a fair statement, Your Honor." That is indeed a fair statement, and it is also why $3 million is a fundamentally unfair penalty on Winston & Strawn.

HRP's final argument is not mentioned here because of alleged error in it; able opposing counsel made no objections to the argument and therefore waived any error. Rather, HRP's final argument is mentioned here to highlight the buttons that were pushed to produce this $3 million punishment of a blameless defendant. The jury did exactly what it was asked by HRP to do; it punished Winston & Strawn for wrongs much greater than — and wrongs completely unrelated to — the evil-minded conduct of Arthur P. Greenfield after March 1, 1981.

D. Measure of damages: Greenfield was the wrongdoer, and it is his financial condition that should have been relevant, not Winston & Strawn's. *See Shetka* v. *Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916 (Minn.1990), another case in which a law firm was held vicariously responsible for the evil-minded conduct of a partner — though in that case, the firm had dissolved and the vicarious liability was passed to the other partners. The *Shetka* court concluded that "for the purpose of determining the amount of a punitive damage award, the financial condition of a nonparticipating, nonculpable vicariously liable party is irrelevant, and, therefore, not discoverable." *Id.* at 919.

In *Wilson* v. *Riley Whittle, Inc.*, this Court held that "the trier of fact can award a higher amount of punitive damages against the master than the amount awarded against the servant." 145 Ariz. 317, 322, 701 P.2d 575, 580 (App. 1985). Even if the *Wilson* rule has merit regarding masters and servants, *Shetka* expresses a better rule for partnerships.

Assuming that the evidence supported any award of punitive damages for Greenfield's evil-minded conduct after

March 1, 1981, the gross (or net) revenues of Winston & Strawn are an unfair measure of punishment. By comparison, all direct and vicarious liability for Greenfield's evil-minded conduct for the sixty-eight-month period from July 1975 to March 1981 was settled for a $1 million penalty. Winston & Strawn's exposure for Greenfield's conduct was six months, March to September, 1981. That Winston & Strawn had the misfortune of hiring Greenfield when it did, rather than six months later, is no reason for a $3 million penalty.

E. Due Process: If the factors required by *Haslip* and *Hawkins* are properly considered, I respectfully submit that the punitive damages penalty imposed on Winston & Strawn is unconstitutional, a taking without due process of law.

The trial court affirmed the award of punitive damages mainly because "based on the evidence presented concerning the financial worth of the Defendant [Winston & Strawn], the amount can not be said to be indicative of passion or prejudice." The majority relies on the same sort of quantitative analysis, finding that: "The award is proportionate to Winston & Strawn's financial position; it represents approximately 3.1 percent of the firm's gross revenues for 1990." Maj. at __, 907 P.2d at 521. With respect, there is more to a punitive damages due process analysis than mathematics, especially when the defendant did nothing wrong. When measuring the fundamental fairness of a multi-million dollar punitive damages taking, especially on a vicarious liability theory, the court must articulate good reason for that penalty, something with more persuasive relationship to traditional notions of fundamental fairness than simply saying, "The defendant can pay it."

Haslip provides that "the fact finder must be guided by more than the defendant's net worth"; it also provides numerous factors to consider in the due process analysis, and advises that because those factors are applied by reviewing courts in Alabama, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a

defendant with a deep pocket." 499 U.S. at 21-22, 111 S.Ct. at 1045. Thus far, the same cannot be said about this Arizona plaintiff.

The punitive damages award should be reversed; failing that, the punitive damages offset should be affirmed.

APPENDIX B

SUPERIOR COURT OF ARIZONA
Maricopa County

December 4, 1991 Hon. Susan R. Bolton P. Woods
Deputy

No. CV 87-39216 (Consol.)

HYATT REGENCY PHOENIX HOTEL COMPANY, et al. — Robert A. Jensen/ D. Michael Hall/ John H. Cassidy

v.

WINSTON & STRAWN — Logan T. Johnston/ Jeffrey C. Brodin

Tom Slutes/ (Tucson) Mark D. Rubin

The Court has had under advisement Defendant's Motion for a New Trial or, in the Alternative to Alter or Amend the Judgment.

Defendant Winston & Strawn first claims that the Court erred in ruling as a matter of law that Winston & Strawn assumed the pre-merger tort liabilities of Craig, Greenfield & Irwin. The evidence submitted in the Motion for New Trial was the same evidence as previously submitted and considered by the Court in making this ruling.

IT IS THEREFORE ORDERED denying Defendant's Motion for a New Trial on this issue.

Defendant also urges that punitive damages should not be awarded against Winston & Strawn for several reasons. The first reason asserted is that the jury's finding that Greenfield was negligent is contrary to the manifest weight of the evidence. The Court finds that the evidence clearly supported the jury's finding of negligence on the part of Greenfield as well as damages and so the necessary prerequisite for actual damages has been satisfied and this argument will not support a motion for new trial on the issue of punitive damages.

Winston & Strawn also argues that an award of punitive damages based on Mr. Greenfield's conduct was not supported by clear and convincing evidence. On the issue of punitive damages, the jury was appropriately instructed under the standard set forth by the Arizona Supreme Court in *Linthicum* and *Rawlings* concerning the requirement of clear and convincing evidence that Greenfield acted with an evil mind. Evil mind was defined for the jury in accordance with the standards set forth by the Supreme Court in *Linthicum* and *Rawlings* and the jury found that Greenfield's conduct satisfied the clear and convincing standard. The Plaintiff presented evidence that throughout his representation of the Plaintiff, including the period of time Greenfield was employed by Winston & Strawn, Greenfield acted with a goal of attempting to protect his client Chanen Construction Company to the detriment of his client HRP and attempted to shift liability for the $3.6 million dollar judgment entered jointly and severally against HRP and Chanen to HRP. While the jury was also presented with Defendant's evidence concerning Greenfield's intentions, the Court finds that the jury could conclude from the evidence presented by the Plaintiff and satisfying the clear and convincing standard that Greenfield acted with an evil mind as defined by the Arizona Supreme Court.

IT IS THEREFORE ORDERED denying the Motion for New Trial on the grounds that the award of punitive damages was not supported by clear and convincing evidence.

Winston & Strawn also argues that even if an award of punitive damages is supported by the evidence as to Greenfield, that Winston & Strawn can not be held liable for punitive damages based on *respondent superior*. In making this argument, Winston & Strawn relies on Section 909 of the Restatement (Second) of Torts and Section 217(C) of the Restatement (Second) of Agency.

The Court finds it unnecessary to analyze Winston & Strawn's arguments concerning the Restatement standard for

the assessment of punitive damages against a master of principal because of the act of an agent. Under present Arizona law as announced by the Arizona Supreme Court as recently as *Wiper* v. *Downtown Development Corporation of Tucson*, 152 Ariz. 309, 732 P.2d 200 (1987) and the Court of Appeals in *Jacobson* v. *Superior Court*, 154 Ariz. 430, 743 P.2d 410 (App. 1987), Arizona has rejected the view of the Restatement as set forth in Section 217(C) of the Restatement (Second) of Agency and Section 909 of the Restatement (Second) of Torts.

> "Arizona has specifically rejected the Restatement view in favor of a rule allowing punitive damages against an employer for acts of its employees 'so long as committed in the furtherance of the employers business and acting within the scope of employment'" *Wiper* v. *Downtown Development Corp.*, 152 Ariz. at 310.
>
> And,
>
> "the Restatement rule on this issue, normally persuasive, has been rejected in Arizona in favor of the principle allowing punitive damages against the employer for acts of the employee if committed in furtherance of the employer's business and in the scope of employment. *Wiper* v. *Downtown Development Corp.*, 152 Ariz. 309, 310, 732 P.2d 200, 201 (1987). But see Restatement (Second) of Torts, Section 909 (1979). Whether the recent case of *Linthicum* v. *Nationwide Life Ins. Co.* foreshadows the shift by the Arizona Supreme Court to the Restatement view is an issue we do not reach in this case." 154 Ariz. at 432.

The Court has reviewed the more recent authorities cited by Defendant in support of its arguments in favor of the Restatement view of liability for punitive damages by an employer and finds that none of those cases have rejected the rule in Arizona set forth in *Wiper* and *Jacobson* in favor of the Restatement rule. In the recent case of *Wyatt* v. *Wehrmueller*, 167 Ariz. 281, 806 P.2d 870 (1991), the Arizona Supreme Court does discuss Restatement of Agency § 217(c) in dicta. That case does not involve punitive damages nor did it involve a situation of employer and employee. This Court is bound by the clear statements of the Arizona Appellate Courts in *Wiper* and *Jacobson* in the absence of clear indication that this precedent has been overruled. The Court is therefore compelled to find that Winston & Strawn is liable for punitive damages arising out of the conduct of its employee Greenfield.

Winston & Strawn also asserts that it can not be held liable for punitive damages because the offending employee was not found guilty of punitive conduct. This Court disagrees. The instructions provided to the jury in this case told the jury that the conduct they were to assess in determining whether punitive damages were to be awarded, was the conduct of Greenfield. No evidence was presented nor was any argument made that Winston & Strawn had liability for conduct apart from Greenfield's or based on the conduct of anyone other than Greenfield. By assessing punitive damages, the jury was assessing punitive damages based on Greenfield's conduct. Unlike the situation in *Wiper* v. *Downtown Development Corporation* the jury in this case could not be presumed to have been holding the employer responsible for punitive damages while exonerating Greenfield. The jury was told that the punitive damages were for the actions of Greenfield that took place after he joined Winston & Strawn on March 1, 1981.

IT IS THEREFORE ORDERED denying the Motion for New Trial on the grounds of the alleged violation of due

process and the claim that punitive damages can not be assessed on the basis of *respondeat superior*.

IT IS FURTHER ORDERED denying the Motion for New Trial on the basis of the punitive damage instruction.

The Court also finds Defendant's claim that the punitive award was based on passion and prejudice to be unsupported by the evidence. Although the amount of punitive damages awarded is large, based on the evidence presented concerning the financial worth of the Defendant, the amount can not be said to be indicative of passion or prejudice, but upon the jury's consideration of the instruction and the purpose for which punitive damages are assessed. For the same reason, no remittitur of the punitive damages can be given.

There is no question but that the award of punitive damages in this case against Winston & Strawn was based solely upon a theory of *respondeat superior*. There was no claim that Winston & Strawn acted negligently or punitively other than through the actions of Greenfield. While this Court has substantial doubts as to whether the purposes behind the award of punitive damages are served by the application of *respondeat superior*, particularly when the party whose conduct is the basis for the award of punitive damages is an experienced lawyer whose conduct is not subject to the same kind of supervision and close scrutiny as the conduct of many other types of employees, this Court is bound by appellate authority on this issue. The current state of the law is that *respondeat superior* is the rule in Arizona for punitive damages in the circumstances of employer and employee.

Defendants again raise the issue of post judgment interest. This Court has considered prior post trial memoranda on this issue and will not reverse its award of pre-judgment interest having found that the sums awarded by the jury were liquidated and therefore pre-judgment interest is required.

IT IS FURTHER ORDERED denying the Motion for New Trial concerning the exclusion of certain evidence.

The final issue before the Court concerns off-set. As indicated at the oral argument of this matter, Defendant Winston & Strawn is entitled to credit for the full compensatory portion of the Greenfield settlement, plus interest at ten percent (10%) per annum from the date the settlement amount was received. The Court rejects Plaintiff's claim of waiver based on alleged procedural error in claiming the credit. In this Court's view, Plaintiff having received this compensatory award, is required to file a partial satisfaction of judgment for the compensatory portion of the verdict entered in this case.

As the Court indicated at the oral argument, it does not believe that the issue of credit for settlement amounts is part of a motion for new trial. As it relates to the compensatory portion of the award the credit is mandatory. The judgment itself is unaffected by any credit or partial satisfaction resulting from a recovery from settling Defendant. Winston & Strawn suggest in a footnote that if its liability for punitive damages is based on *respondeat superior* then it should also be entitled to a credit of $1 million based on the punitive damages settlement paid to HRP by the settling Defendants. Plaintiff disputes this claiming that the punitive award against Winston & Strawn is based upon other deterrents allegedly being accomplished by the full punitive award against Winston & Strawn. Specifically, Plaintiff suggests that Greenfield was a managing agent and there was a rationale for assessing punitive damages independently against Winston & Strawn as a deterrent for the employment of unfit persons. However, it is this Court's view that punitive damages in the case were based exclusively on *respondeat superior*. There is no evidence upon which punitive damages could be independently assessed against Winston & Strawn for any conduct separate and apart from the conduct of Greenfield. In this Court's view by agreeing to accept $1 million in punitive damages from Greenfield, the Plaintiff is also

required to credit that $1 million against the punitive damage award against Winston & Strawn. To allow recovery of the full $3 million would be allowing a double recovery of one-third of the punitive damages assessed because of Greenfield's conduct. The settlement effects a partial satisfaction of the punitive damages as well.

IT IS THEREFORE ORDERED denying Defendant Winston & Strawn's Motion for New Trial and to Alter or Amend the Judgment.

APPENDIX C

SUPREME COURT

Noel K. Dessaint
Clerk of Court

State of Arizona

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December 21, 1995

RE: **HYATT REGENCY PHOENIX HOTEL CO/ NAMETCO CORP et al vs. WINSTON & STRAWN**
Supreme Court No. CV-95-0281-PR
Court of Appeals No. 1 CA-CV 92-0133
Maricopa County No. CV 87-39216 and CV 89-10586 [Consolidated]

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 19, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review [Arthur P. Greenfield] = DENIED.

FURTHER ORDERED: Petition for review [Winston & Strawn, P.C.] = DENIED

Justice Martone voted to grant the Petition for Review [Winston & Strawn, P.C.] on issues A(1) and A(4).

FURTHER ORDERED: Cross-Petition for Review [Hyatt Regency Phoenix Hotel] = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Hyatt Regency Phoenix Hotel] = DENIED.

Justice Corcoran recused himself and did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix this 21st day of December, 1995.

NOEL K. DESSAINT, Clerk

TO:
John H. Cassidy, Esq., D. Michael Hall, Esq., Randall D. Wilkins, Esq. and Paul V. Bonn, Esq., Bonn, Luscher, Padden & Wilkins, Chartered
Logan T. Johnston, Esq. and Jeffrey C. Brodin, Esq., Johnston Maynard Grant & Parker
Tom Slutes, Esq. and Mark Rubin, Esq., Slutes, Sakrison, Even, Grant & Pelander, P.C.
Daniel J. McAuliffe, Esq. and Martha E. Gibbs, Esq., Snell & Wilmer One Glen D. Clark, Clerk, Court of Appeals, Division One
Lexis-Nexis
lkk

No. 95-1475

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WINSTON & STRAWN,

Petitioner,

vs.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances, a verdict of three million dollars in punitive damages awarded against a law partnership (in favor of a client) by a properly instructed jury (which awarded over $1.2 million in compensatory damages to which the trial court added over $650,000 in pre-judgment interest) required the Arizona trial court or the Arizona Court of Appeals to order a remittitur or new trial under the Due Process Clause of the Fourteenth Amendment because only the conduct of the partner who managed the client's representation was put in issue (by either Plaintiffs or Defendant) at trial.

STATEMENT PURSUANT TO RULE 29.6

Respondent Nametco Corporation is the parent company of respondent National Metals Company. Southwest Alloys Corp. is a partially owned subsidiary of National Metals Company. All other subsidiaries are wholly owned.

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Respondents ("HRP") respectfully oppose Winston & Strawn's Petition for a Writ of Certiorari to review the judgment of the Court of Appeals of Arizona in this case, requesting that its Petition be denied.

STATEMENT

Cursory comparison of Winston & Strawn's Statement with the opinion of the Arizona Court of Appeals (which HRP hereby adopts as part of its Statement) suggests that they are addressing different cases. They are not. Winston & Strawn is simply presenting the same one-sided story that was rejected by the jury, the trial court, the Arizona Court of Appeals and, by denying review, the Arizona Supreme Court. Moreover, Winston & Strawn does not argue in its Petition or state as an issue presented for review that the jury-found facts as recited by the Arizona Court of Appeals lack substantial support in the record. Winston & Strawn merely cites selectively to evidence favorable only to it — and speculates. When presented with this same "appellate technique," the Arizona Court of Appeals gave it short shrift: "Winston & Strawn's argument overlooks several important facts which the jury did not overlook." *Hyatt Regency Phoenix Hotel Co. et al. v. Winston & Strawn*, __ Ariz. __, 907 P.2d 506, 518 (App. 1995) (*rev. den.* 1995); Appendix to Winston & Strawn's Petition at 21a. (The Court of Appeals opinion will hereafter be cited as "907 P.2d, at __; App. at __".) This Court is equally strict. *Missouri, K. & T. Ry. Co. v. Haber*, 169 U.S. 613, 639, 18 S. Ct. 488, 42 L. Ed. 878 (1898) ("Much was said at bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury . . ." (citation omitted)); *Basham v. Pennsylvania Co.*, 372 U.S. 699, 700-01, 88 S. Ct., 10 L. Ed. 2d 80 (1963) ("Only when there is a *complete absence of probative facts* to support the conclusion reached [by the jury] does a reversible error appear") (quoting earlier case; bracketed insert

(a) The incorrect actual assumption is that Winston & Strawn could not possibly have undone the damage to HRP caused by pre-merger conduct. However, the Arizona Court of Appeals held that the jury had "substantial evidence" from which to find otherwise. *See supra* at (1). Winston & Strawn's assumption must be rejected. *Haber, supra*; *Basham, supra.*

(b) Winston & Strawn also incorrectly assumes that when two partnerships merge to form a new partnership, the proper "ratio" to consider involves only post-merger compensatory damages. Not only is this patently wrong in light of Arizona partnership law (which holds the post-merger partnership liable for the debts of both partnerships), but Winston & Strawn nowhere in its Petition suggests that this contention was raised as part of a federal question. *See* Rule 14.1(g)(i). In any event, even were such the rule, it is inapplicable to these facts where the jury "could reasonably have concluded" that the post-merger malpractice resulted in very substantial damages. *See supra* at (1).

4. As even Winston & Strawn's Statement of the case shows, this action does not present a situation where a jury was invited to base the amount of its punitive damages award upon a *multiplication* of the damages allegedly caused by a defendant's similar conduct towards persons *other* than the plaintiff. This is not a "repetitive conduct" case.

In short, contrary to Winston & Strawn, this case is by no means similar to BMW of North America, Inc. v. Gore, No. 94-896 — where BMW is represented by Winston & Strawn's counsel of record here. Neither "repetitive conduct" nor a large punitive

to compensatory damages ratio is involved here. The ratio is 2 or 3:1 (depending in part on treatment of pre- and post-judgment interest[2]*). Cf. 907 P.2d, at 521; App. at 27a, where the Arizona Court of Appeals states the punitive award is "less than three times HRP's compensatory damages."*

(5) Winston & Strawn states that this a "pure derivative liability" case, as though this were an "innocent employer"/ menial employee situation. This is false. The Court of Appeals affirmed the punitive damages judgment based not only upon Arizona's *respondeat superior* theory (similar to the theory which this Court held passed due process muster in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)), but also upon three separate additional bases:

> (a) Arizona Revised Statutes ("A.R.S.") § 29-213, which explicitly imposes liability on partnerships for "any penalty." 907 P.2d, at 514; App. at 11a-13a.
>
> (b) Under general partnership law, according to which, the Arizona Court of Appeals, quoting from the *Restatement (Second) of Agency*, ch. 7, scope note at 454, explained: "[for the purposes of imposing punitive damages], the conduct of any member of a partnership . . . can be treated as the conduct of a principal." 907 P.2d, at 514 n. 6; App. at 12a n. 6.

---

2. Defendants typically focus on verdict amounts and ignore judge-awarded pre-judgment interest and statutory post-judgment interest. While that focus may make sense in a "passion and prejudice" analysis, it does not seem to make sense in the different "due process" analysis (at least with respect to pre-judgment interest). However, this issue is palpably of no importance here, and HRP will just use "2 or 3:1 ratio."

(c) And "even if Arizona followed the *Restatement [(Second) of Torts* § 909] view, Winston & Strawn could still be liable in punitive damages because it employed Greenfield in a managerial capacity and he managed HRP's case." 907 P.2d, at 516 n. 11; App. at 17a n. 11.

(6) Moreover, as the Arizona Court of Appeals explained, 907 P.2d, at 515; App. at 14a:

> In its opening statement, Winston & Strawn proclaimed:
>
> > And I'll make the deal with you right now if you think he [Greenfield] lacks integrity and tried to prefer one client over the other and did so and hurt HRP and Shapiro, find against him. Find against Winston & Strawn.
>
> The position taken by Winston & Strawn at trial and the position taken by it on appeal and apparently accepted by the dissent are irreconcilable. . . .

(7) Winston & Strawn repeatedly suggests that Greenfield's conduct did not warrant punitive damages. As the Arizona Court of Appeals noted, "even the dissent agrees that Greenfield's conduct was reprehensible and that the harm to HRP was severe." 907 P.2d, at 517; App. at 17a. Indeed, although Winston & Strawn emphasizes that "the record contains no evidence that Greenfield was even charged with a disciplinary violation by the Arizona Bar," (Petition at 19),[3]

---

3. But the absence of evidence of confidential Bar disciplinary (Cont'd)

Winston & Strawn does not mention the closing sentence of the Court of Appeals' opinion (to which the dissenting Judge did not object): "Finally, we direct the Clerk of this Court to send a copy of this opinion to the State Bar of Arizona Disciplinary Commission for its review." 907 P.2d, at 527; App. at 40a. The majority plainly agreed that an "evil mind" had been proven by "clear and convincing evidence." 907 P.2d, at 518-19; App. at 20a-23a.

(8) Winston & Strawn focuses heavily, but irrelevantly, on allegedly inflammatory language used by HRP's trial counsel during *closing* argument. Winston & Strawn fails to note, first, that even the dissenting Judge in the Court of Appeals acknowledged that any such complaint had been waived — Winston & Strawn made no objection. 907 P.2d, at 530; App. at 47a. Second, as the majority opinion pointedly noted, trial counsel's comments were in direct reaction to *earlier* (similar) "rich people" remarks made by Winston & Strawn's trial counsel about HRP (singling out HRP partner Sam Shapiro) "throughout the trial," *including* during *opening* statement. 907 P.2d, at 521 n. 15; App. at 27a-28a n. 15.

(9) Throughout, Winston & Strawn argues that the jury and the Arizona judges focused merely upon its wealth in order to determine and justify the amount of the punitive damage award. This is simply contrary to the evidence analysis of the Arizona Court of Appeals which focused, in addition and *inter alia*, on the purposes of punitive damage awards, the potential for harm to HRP by Winston & Strawn's conduct (the shifting of the entire $3.6 million potential liability to it), Winston & Strawn's concealment of its conduct from HRP, and the fact that the conduct favored a much richer and more important client. 907

(Cont'd)
proceedings does not give rise to an inference that such confidential proceedings have not been brought.

P.2d, at 521-22, 518-19; App. at 27a, 21a-23a. All that evidence was before the jury and trial judge.

SUMMARY OF ARGUMENT

HRP details the following reasons in the next section (in the following order) for denying Winston & Strawn's Petition for Certiorari (for convenience, the numbering here is followed in that section as well):

(1) Winston & Strawn asserts that this is a "*BMW*" case. It is not. All the punitive damages issues in *BMW* arise because the trial was "infected" with evidence and argument about *non*-parties who were subjected to similar conduct by BMW. No such evidence or argument is involved in this case. Moreover, contrary to Winston & Strawn, this case involves a 2 or 3:1 ratio (of punitive to compensatory damages).

(2) The Rules of the United States Supreme Court, Rule 14.1(g)(i), require a detailed affirmative showing that this Court has jurisdiction over the question presented because that question was in fact adequately presented to the state courts and ruled upon by them. Winston & Strawn disregards this Rule, making no attempt at compliance. The opinion of the Arizona Court of Appeals, and the trial court's post-judgment decision do *not* reflect that the question Winston & Strawn presents for review here "was pressed and passed upon below." Winston & Strawn's lack of candor in failing to admit that it needed to make a "mere enlargement" argument — and obviously its failure to make the required argument — calls for denial of its Petition. Even if Winston & Strawn were permitted to make a belated "mere enlargement" argument, both comity and prudence nonetheless counsel against granting certiorari because the Arizona courts have not considered the issue and the record below plainly was not developed in light of this new contention.

(3) Winston & Strawn's Petition egregiously misstates the facts as recounted and approved by the Arizona Court of Appeals' opinion without any attempt to show that the Court of Appeals' opinion inaccurately states the facts as found by the jury on "substantial evidence."

(4) Winston & Strawn's Petition describes this as a case of "pure derivative liability" implying an "innocent employer"/ menial employee situation. This ignores the Court of Appeals three alternative holdings (based on varying different and higher standards) justifying imposition of punitive damages liability in the verdict amount, and as further approved by the trial court and Court of Appeals.

(5) In the end, Winston & Strawn is just claiming that the Arizona Courts misapplied correctly stated rules of law. Certiorari is "rarely granted" in such cases. Rules of the United States Supreme Court, Rule 10.

(6) Given the foregoing, the only actual question presented is whether a 2 or 3:1 ratio of punitive to compensatory damages, awarded by a properly instructed jury, approved by a state trial court and court of appeals applying correctly stated rules of law, *ipso facto* violates due process. This Court's past precedent is directly to the contrary, and Winston & Strawn provides no reason for revisiting that precedent.

REASONS FOR DENYING THE PETITION

I.

THE ISSUES RAISED BY THE *BMW* CASE ARE NOT PRESENT IN THIS CASE DESPITE PETITIONER'S CLAIM TO THE CONTRARY.

Winston & Strawn alleges that *BMW of North America, Inc. v. Gore*, No. 94-896, which is pending before this Court, raises "a virtually identical issue" to that raised here. Petition at 17. This is simply not so for two reasons.

First, HRP's review of the briefs and oral argument before this Court in *BMW* make it clear that the punitive damage issues in *BMW* arise from the admission of evidence, and jury argument, regarding conduct of BMW which, while similar to the conduct complained of, concerned *other* individuals, not the plaintiff, and which occurred in some cases in jurisdictions where BMW's conduct was clearly lawful. But the case at bar does not involve such "repetitive conduct" in the first place.

Second, Winston & Strawn presents a convoluted quasi-mathematical argument resulting in the erroneous conclusion that the ratio of punitive damages to compensatory damages here is approximately 450:1, since the quasi-mathematics supposedly yield damages to HRP of only some $6,000 during the post-merger period. Petition at 21-22. This argument was never presented to any court below. Moreover, the very premise of Winston & Strawn's argument conflicts with the plain statement of the Arizona Court of Appeals that there *was* "substantial evidence" (obviously ignored by Winston & Strawn here) from which "the jury could reasonably have concluded" that "HRP could have significantly reduced its liability in the [underlying] litigation" during Winston & Strawn's

representation of HRP because during six months of that period (before the Special Master issued his final report) "the parties still had an opportunity to change the outcome of the case." 907 P.2d, at 517; App. at 18a-19a. In contrast, then, the false factual predicate of Winston & Strawn's argument is that there was no post-merger opportunity to change the outcome of the underlying litigation. Winston & Strawn should not, and cannot, ask this Court to disregard facts found by the jury on substantial evidence. *Haber, supra*; *Basham, supra*. Winston & Strawn's argument is in any event belied by its payment of $1.7 million in compensatory damages.

In short, this is a 2 or 3:1 ratio case — a ratio which BMW itself conceded (with a minor *caveat*) to be unchallengeable on due process grounds. *See* BMW's Opening Brief at p. 33 n. 20 (1995 WL 126508).

In any event, BMW's "ratio" argument also largely (if not entirely) depends upon the "*repetitive*" or multiplicative aspect of that case. [*See* Brief for Petitioner at p. 45; Reply Brief at 15 (1995 WL 126508)].

The case at bar is a 2 or 3:1 ratio case with the compensatory damages being those suffered by HRP, *not* some collection of non-parties; there is no huge ratio resulting from a multiplication of alleged damages to non-parties.

No envisageable ruling by this Court in *BMW* can affect the resolution of *this* case. That Winston & Strawn's counsel of record (*who is also BMW's counsel of record*) should argue otherwise to this Court alone supports denial of Winston & Strawn's Petition. Rule 14.4 ("the failure of a petitioner to present [its case] with accuracy . . . is sufficient reason for the Court to deny a petition").

II.

WINSTON & STRAWN MADE NO ATTEMPT TO COMPLY WITH RULE 14.1(g)(i).

The federal question Winston & Strawn presents is:

> Whether a $3 million punitive exaction in a case of pure vicarious liability is so excessive as to violate the Due Process clause of the Fourteenth Amendment. Petition at (i).

The question is very broad, but at least signals some sort of *due process* argument based on an *interplay* between punitive damages and (allegedly) "pure vicarious liability."[4] Rule 14.1(g)(i) provides in part:

> 1. A petition for a writ of certiorari shall contain, in the order indicated:
>
> * * *
>
> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> * * *
>
> (i) If review of a state-court

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4. *What* that argument might turn out to be were certiorari to be granted is not especially clarified by the rest of Winston & Strawn's Petition. Winston & Strawn cites to no case holding there are *special* due process requirements in such a case; it offers not even the outline of a principled argument, let alone a constitutionally based one.

> judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgement on a writ of certiorari. . . .

The mandate of this Rule is quite clear. Winston & Strawn ignores it. Winston & Strawn merely refers to, and its appendix only contains, a post-judgment opinion of the trial court, the Arizona Court of Appeals' published decision, and the Arizona Supreme Court's Order denying review. None of these documents reflect a claim by Winston & Strawn that *respondeat* liability for punitive damages requires some special non-*Haslip* federal due process analysis.[5] Its due process arguments were

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5. In *Haslip*, *supra* at 499 U.S., 12-15 and 23 n. 11, this Court rejected due process attacks on "pure" *respondeat* liability for punitive damages and, moreover, specifically addressed and rejected the contention that due process, in such context, requires proof by clear and convincing evidence. Winston & Strawn argues that *Haslip* was not a "pure" derivative liability case because (Cont'd)

limited to Arizona procedural matters in light of this Court's opinion in *Haslip, supra*. Its arguments about *respondeat* liability and punitive damages were limited to state law issues. *Cp*. 907 P.2d, at 514-17; App. at 11a-17a (discussing only *state* law issues regarding interplay between *respondeat* liability and punitive damages) *with* 907 P.2d, at 519-21; App. at 23a-27a (*not* discussing *respondeat* issues in discussing Winston & Strawn's due process contentions) *and* 907 P.2d, at 521-22; App. at 27a-28a (discussing only *state* law remittitur issues raised by Winston & Strawn and not addressing any potential *respondeat* or due process issues in connection therewith). In fact, it appears that Winston & Strawn has simply taken a hint from Judge Noyes' dissent in the Arizona Court of Appeals — he suggests (among a number of other things) that there is *some* sort of special due process concern in "pure derivative liability" cases. But Judge Noyes was in effect just offering some general suggestions to *future* punitive damage defendants for their elaboration. His *respondeat*/due process suggestion is as notable for its lack of elaboration as for its passion. Winston & Strawn's Petition is similar, but does not suggest that any meaningful "elaboration" would be forthcoming were certiorari granted.

Certainly, the failure of Winston & Strawn's experienced counsel to make even a minimal gesture in satisfaction of the plain requirements of Rule 14.1(g)(i) confirms Winston & Strawn's "waiver." As this Court explained in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987):

(Cont'd)
there was some evidence that Pacific Mutual's Birmingham office had received some hint of an ongoing pattern of fraud. *Haslip, supra* at 499 U.S., 14. But this Court's analysis does not appear to have relied on this fact; this Court's analysis in *Haslip* addressed the straightforward Alabama *respondeat* doctrine which does not require any such "hint." *Id.*

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 US 493, 496-497, 68 L Ed. 2d 392, 101 S Ct 1889 (1981). Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When " ' "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' " Exxon Corp. v Eagerton, 462 US 176, 181, n 3, 76 L Ed 2nd 497, 103 S Ct 2296 (1983) (quoting Fuller v Oregon, 417 US 40, 50, n 11, 40 L. Ed. 2nd 642, 94 S. Ct. 2116 (1974) (quoting Street v New York, 394 US 576, 582, 22 L. Ed. 2d 572, 89 S Ct 1354 (1969))). Appellants have made no such showing in this case.

(Footnote omitted).

Accordingly, it appears that the only federal question which could be presented to this Court consistently with Winston & Strawn's statement of the question presented and its arguments below is whether a 2 or 3:1 ratio is *ipso facto* precluded by due process — a federal question which affords no relief to Winston & Strawn. (This Court's prior decisions make it plain that a 2 or 3:1 ratio meets due process standards — *see infra* at (6).)

III.

WINSTON & STRAWN' STATEMENT OF THE CASE CONFLICTS DRAMATICALLY WITH THE FACTS AS STATED IN THE DECISION OF THE ARIZONA COURT OF APPEALS.

A cursory comparison of the Court of Appeals' decision with Winston & Strawn's Petition suggests that there are two entirely different cases before this Court. This is particularly true of the alleged facts stated in Winston & Strawn's Petition. Winston & Strawn's "facts" are simply diametrically opposed to the facts found by the jury as recounted by the Court of Appeals' decision (and found by it to be based on substantial evidence). Winston & Strawn makes no attempt to show that the facts found by the jury (as stated in the Court of Appeals' decision) in fact lack substantial evidence in the record. Accordingly, Winston & Strawn's "story" is *not accurate*, and dramatically so. *Haber, supra; Basham, supra.* Rule 14.4 requires a petitioner to be accurate and its failure to do so is stated to be sufficient reason for the Court to deny a Petition. Massive inaccuracy of the sort presented by Winston & Strawn's Petition calls for just such denial.

IV.

THIS IS NOT A CASE OF "PURE DERIVATIVE LIABILITY."

As noted above, Winston & Strawn attempts to characterize this case as though it involved an "innocent employer"/menial employee situation, "pure" *respondeat* or derivative liability.[6]

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6. As noted above, n. 5, Winston & Strawn presents a *flawed* argument that *Haslip* was *not* a "pure" *respondeat* case. It was.

While it is true that Arizona law permits imposition of punitive damage liability in such a situation, Winston & Strawn at best over-simplifies. As explained above, the Court of Appeals held in the alternative that imposition of punitive damages (presumably including the amount thereof) was justified on *three* additional grounds: (a) general partnership law (where the conduct of a partner is the conduct of the partnership and so this is legally not a true case of "derivative" liability in the first instance); (b) under the *Restatement (Second) of Torts* (because Greenfield was a managerial agent with respect to the conduct in question); and (c) under Arizona's version of the Uniform Partnership Act § 13, A.R.S. § 29-213.

Obviously, each of these four bases for imposing punitive liability, and in what amount, raise distinct jurisprudential issues (although whether they raise any *federal* questions is very doubtful). This complicates the Court's task were certiorari to be granted. In addition, to the best of HRP's knowledge, neither the highest court of any state nor any federal court of appeals has addressed any due process implications in a case involving these distinct and varying bases. Certainly, HRP is aware of no such court having ruled favorably for a defendant with respect to such an argument on federal due process grounds. Accordingly, the issue presented (if it is properly presented) is not one appropriate for this Court's review. This is not just an issue that deserves *further* "percolation" in the lower courts: it has simply had no percolation to speak of. Rule 10(a) and (b); *Yee, supra* at 503 U.S. 538.

V.

THIS COURT "RARELY" GRANTS CERTIORARI IN CASES OF THIS TYPE.

Rule 10 (Considerations Governing Review on Certiorari) states those considerations upon which the Court looks favorably in granting certiorari. By its silence, Winston & Strawn concedes that none are applicable here.[7] Rule 10 also states "a petition for a writ of certiorari is rarely granted where the asserted error consists of . . . the misapplication of a properly stated rule of law." That is the asserted error here. Winston & Strawn points to no error in any statement of law by either the trial court or the Court of Appeals but merely claims that these courts "flubbed it," Petition at 21, contending that these courts misapplied the correct rules of law.

VI.

THE OUTCOME OF THIS CASE IS PREDETERMINED BY THIS COURT'S PRECEDENT.

This case raised some interesting questions of Arizona state law, including some of first impression. It raised no interesting questions of federal constitutional law, let alone any that were properly preserved. Both the trial court and the Arizona Court of Appeals carefully analyzed the due process arguments presented by Winston & Strawn and properly found that due process had been accorded. There is no contention by Winston & Strawn that the Arizona Courts incorrectly stated the due process rules as

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7. It is nonetheless worth noting that Rule 10(c) is inapplicable because, since Winston & Strawn did not raise with the Arizona courts the question it now presents to this Court, the Arizona courts did not pass on it. Certainly, the opinion of the Arizona Court of Appeals will not "stand in the way" of a future Arizona litigant concerned with this issue.

enunciated by this Court in its relevant recent cases from *Haslip* through *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. __, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), and *Honda Motor Co. v. Oberg*, __ U.S. __, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994), all of which were extensively reviewed by the Arizona Court of Appeals. 907 P.2d, at 519-21; App. at 23a-27a. This Court has not identified any *special* due process concern with the imposition of punitive damages on even a "pure" *respondeat* basis, let alone the three additional bases supporting such liability here. Moreover, this Court declined in *Haslip* to require a clear and convincing evidence standard of proof in a *respondeat* context; in contrast, Arizona requires that standard of proof across the board on state public policy grounds. In addition, the ratio of punitive to compensatory damages here is only 2 or 3:1. *TXO, supra,* in conjunction with the factual factors analyzed by the Arizona Court of Appeals, refutes any doubt as to the propriety of the amount of the award. Winston & Strawn has given this Court no reason to revisit its recent relevant and dispositive precedent.

CONCLUSION

For the foregoing reasons, HRP respectfully requests this Court to deny Winston and Strawn's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 95-1475

In the Supreme Court of the United States

OCTOBER TERM, 1995

WINSTON & STRAWN, *Petitioner*

v.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As we explained in the petition (and as respondents do not dispute), the $3 million punitive exaction in this case bears no relationship to either the innocent conduct of Winston & Strawn or even the so-called malpractice of Arthur Greenfield. Indeed, because Winston & Strawn indisputably did nothing wrong, there simply is no way in which the alarming amount of punishment imposed against it could be said to be reasonably necessary to accomplish Arizona's interests in retribution and deterrence. Notably, respondents do not even attempt to argue otherwise. The arguments that they do make fall far short of justifying the extraordinary action of denying the petition without awaiting the disposition of *BMW*.

1. Respondents' principal contention is that the issue presented was not raised below. See Opp. 13-17. That contention is predicated upon a fundamental misunderstanding of the question presented. Contrary to respondents' perception (Opp. 13), the question presented is not whether "*respondeat* liability for punitive damages requires some special non-*Haslip* federal due process analysis." Rather, we present a straightforward excessiveness challenge to the $3 million exaction. To be sure, the question refers to the fact that liability was purely vicarious, but that reference merely draws the Court's attention to one aspect of the case that makes the punishment especially outrageous. The petition itself discusses multiple factors that mandate the same conclusion. It is frankly impossible to read the petition and conclude that the issue presented involves some kind of "special" due process challenge to the imposition of vicarious liability.

Respondents acknowledge that Winston & Strawn has a preserved due process challenge to the amount of punitive damages. See Opp. 15 ("the only federal question which could be presented to this Court consistently with Winston & Strawn's statement of the question presented and its arguments below is whether a 2 or 3:1 ratio [of punitive to

compensatory damages] is *ipso facto* precluded by due process"); *id.* at 9 ("the only actual question presented is whether a 2 or 3:1 ratio of punitive to compensatory damages * * * *ipso facto* violates due process"). Although we disagree with the way in which respondents have framed the issue, there can be no doubt that it fully encompasses the issue presented in the petition.

2. In an effort to avoid having the petition held during the pendency of ***BMW,*** respondents emphasize that this case, unlike ***BMW,*** does not involve "repetitive conduct." Opp. 10, 11. But the fact that there were other individuals affected by BMW's conduct is an affirmative *justification* by Dr. Gore for the $2 million exaction in ***BMW*** (albeit one that BMW contends cannot properly be used to support the judgment). The *absence* of a similar justification here is hardly grounds for claiming that the petition should be denied without awaiting the outcome of ***BMW.***

3. In the petition (at 21-22), we demonstrated that the punitive damages are disproportionate to the harm to respondents caused by Greenfield after he joined Winston & Strawn. That disproportionality, we contended, is an important indication of the excessiveness of the $3 million exaction.

Respondents urge this Court to ignore our showing because the Court of Appeals concluded that there was substantial evidence from which the jury could have found that, but for Greenfield's continuing malpractice, "HRP could have significantly reduced its liability in the [underlying] litigation." Opp. 10 (quoting Pet. App. 19a). Importantly, however, the Court of Appeals' statement did not purport to be a finding of fact regarding the *quantum* of damages fairly attributable to conduct occurring after Greenfield joined Winston & Strawn. Rather, the court's statement was made in response to the argument that HRP suffered *no* damages as a result of such conduct and therefore lacked a basis for

recovering *any* punitive damages against Winston & Strawn. See Pet. App. 17a-18a.

Thus, the Court of Appeals simply did not address the question whether the evidence could support a finding that the full amount of HRP's compensatory damages is the correct measure of the harm caused by misconduct occurring after Greenfield joined Winston & Strawn. Indeed, any suggestion that Greenfield's conduct in the period after he joined Winston & Strawn was a but-for cause of most or all of HRP's damages would have been demonstrably incorrect. To begin with, respondents' own experts conceded that, by the time Greenfield joined Winston & Strawn, there was nothing that could have been done to relieve HRP of liability and that, at most, HRP could have been spared a few months of damages for wrongful detention of the forms. See Pet. 10-11. Those witnesses did not, and could not, testify that, a full year after the trial and three months after the Special Master announced his liability finding,[1] HRP could have taken some eleventh-hour corrective action that would have changed the Special Master's mind and caused him to relieve it of liability.

The Court of Appeals majority identified two continuing acts of alleged malpractice that it believed could have been rectified even after Greenfield joined Winston & Strawn — Greenfield's adherence to the disclosed principal argument and his failure to invoke the AIA contract as a defense against Form-Eze and Inryco and as a basis for a cross-claim for indemnification against Chanen. There is no basis, however, for concluding that the mere continuation of these two alleged acts of malpractice caused HRP's injury. First, Greenfield's

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[1] Although respondents ignore it, they stipulated at trial that, on December 8, 1980 — *i.e.*, three months before Greenfield joined Winston & Strawn — "the Special Master stated at a hearing that he had found in favor of Form-Eze and Inryco against both Chanen and HRP." 5/13 Tr. 96.

adherence to the disclosed principal argument had no effect whatever on the outcome because the Special Master *rejected* that contention. See P. Exh. 109, ¶¶ 6, 69. Second, putting aside the extreme unlikeliness that the Special Master would have allowed HRP to raise a brand new defense one year *after* trial,[2] the proposition that Form-Eze and Inryco could have their rights of recovery limited by a contract to which they were not parties is manifestly unsound. As for invoking the AIA contract as a basis for a cross-claim for indemnification, HRP had every right to bring such a claim after the proceedings concluded, but chose not to. What is more, the AIA contract required that disputes between HRP and Chanen be submitted to arbitration, not litigated as a cross-claim. See P. Exh. 2, AIA Document A201, ¶ 7.10.1. There simply was no basis whatever on which a rational jury could have concluded that HRP was in any way harmed by the fact that the cross-claim was not presented during the three-month period between the date Greenfield joined Winston & Strawn and the date the Special Master rendered his ruling.

In short, it belies common sense to suggest that, even though Greenfield did not join Winston & Strawn until after the Special Master had expressly determined to impose liability jointly and severally against HRP and Chanen, the reasonableness of Winston & Strawn's punishment should be measured against the full amount of HRP's compensatory damages. This Court is not obliged to accept the Court of Appeals' statements relating to an entirely different issue in evaluating whether the punishment is excessive.

4. The only other point in the opposition that merits response is the contention (Opp. 5-6, 18-19) that this was not a case of pure vicarious liability. To begin with, we remind the Court that, during the hearing on the post-trial motions, respondents expressly agreed with the trial court's statement

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[2] It bears emphasis that the record contains no evidence to support such an unlikely assumption.

that "the only basis for punitive damages against Winston & Strawn was * * * the conduct of Art Greenfield. It wasn't a claim that he was negligently hired or retained or supervised." Pet. App. 46a-47a. Respondents do not contend otherwise here. Instead, they state that punitive damages were permissible because (1) under general principles of partnership law, the conduct of any partner can be treated as the conduct of the partnership for purposes of imposing punitive damages; (2) Greenfield managed HRP's case and thus could be said to have occupied a managerial position for purposes of the Restatement's standard for vicarious imposition of punitive damages; and (3) Arizona partnership law makes partnerships liable for any penalty incurred by a partner acting in the ordinary course of the partnership's business. It takes no more than a moment's reflection to realize that all of these are means for imposing liability vicariously. None have anything to do with whether the partnership bore any fault itself.[3]

In any event, the issue here is not whether liability for punitive damages may be imposed at all, but rather whether the amount imposed was unreasonably and grossly excessive. The undisputed fact that Winston & Strawn itself engaged in no misconduct surely should be relevant to that inquiry.

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[3] Respondents also place reliance (Opp. 6) upon Winston & Strawn's opening statement, which invited the jurors to "find against" both Greenfield and Winston & Strawn if they were to conclude that Greenfield lacked integrity and tried to prefer Chanen over HRP. Given that the trial court had already held that Winston & Strawn was fully responsible for all *compensatory* damages arising out of malpractice that took place when Greenfield was with CG&I (see Pet. App. 28a-29a), it is perfectly understandable that, in opening statements, Winston & Strawn would tie itself to Greenfield. That hardly constitutes a concession that Winston & Strawn itself was guilty of any misconduct.

CONCLUSION

At the end of the day, the punishment in this case remains a paradigm of excessiveness. It bears no relationship to the gravity of either Winston & Strawn's innocent conduct or even Greenfield's negligent misconduct. It is utterly disproportionate to any harm suffered by HRP as a consequence of conduct occurring after Greenfield joined Winston & Strawn. It is dozens of times greater than whatever "profits" Winston & Strawn earned from Greenfield's joint representation of Chanen and HRP. And it cannot seriously be thought to be reasonably necessary to further Arizona's interests in deterring and punishing malpractice. If the Court reaches the excessiveness issue in *BMW*, its ruling in that case surely will impact upon the validity of the punishment against Winston & Strawn. If the Court does not reach the excessiveness issue in *BMW*, the present case would be an appropriate one in which to do so. The petition for certiorari should be granted.

Respectfully submitted.

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No. 95-1475

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WINSTON & STRAWN, *Petitioner*

v.

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Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Ford Motor Co. v. *Sperau*, No. 95-771 (May 28, 1996)	1
Oxy USA Inc. v. *Continental Trend*, No. 94-1838 (May 28, 1996)	1

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Winston & Strawn respectfully submits this supplemental brief to call attention to new authority not available at the time of petitioner's last filing. Petitioner suggests that in light of the recent decision in *BMW of North America, Inc.* v. *Gore*, No. 94-896, 64 U.S.L.W. 4335 (May 20, 1996), the Court should grant certiorari, vacate the judgment below, and remand this case for reconsideration, just as the Court did with four cases decided yesterday.[1] In *BMW*, the Court identified "[t]hree guideposts" that are relevant to the constitutionality of a punitive award: the "degree of reprehensibility" of the defendant's conduct; the "disparity between the harm or potential harm" suffered by the plaintiff and the amount of the punitive judgment; and "the difference between the [punitive] remedy and the civil penalties authorized or imposed in comparable cases." Slip op. 14. Here, these considerations demonstrate that, as in *BMW*, the punitive award is "grossly excessive in relation to" the state's interests in punishment and deterrence. *Id.* at 7.

1. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, slip op. 14. Here, that degree of reprehensibility is exceedingly small. We explained in the petition (at 18-21) — and respondent did not disagree in its brief in opposition — that Winston & Strawn itself actually did nothing wrong at all. The sole basis for Winston & Strawn's liability is its merger with Greenfield's firm at the tail end of Greenfield's lengthy representation of HRP and Chanen. There has been no suggestion that Winston & Strawn failed to supervise Greenfield adequately, that its procedures for preventing conflicts were defective, or that the liability here is anything other than *purely* vicarious. This

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[1] *Apache Corp.* v. *Moore*, No. 95-1414 (May 28, 1996); *Combustion Engineering, Inc.* v. *Johansen*, No. 95-1072 (May 28, 1996); *Ford Motor Co.* v. *Sperau*, No. 95-771 (May 28, 1996); *Oxy USA Inc.* v. *Continental Trend*, No. 94-1838 (May 28, 1996).

obviously is not a case where the defendant's misconduct involved violence, "'trickery or deceit,'" or "intentional malice," where the defendant "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful," or where the record discloses "deliberate false statements, acts of affirmative misconduct, or concealment of evidence or improper motive" on Winston & Strawn's part. *BMW*, slip op. 15, 16, 19 (citation omitted). As a consequence, "[i]n this case, none of the aggravating factors associated with particularly reprehensible conduct is present." *Id.* at 15-16. See *id.* at 20.

Even looking only at Greenfield's actions (rather than those of Winston & Strawn), the misconduct here barely tipped the reprehensibility scale. See Pet. 19-20. Greenfield undertook a joint representation of two entities that had a long history of being represented jointly, and HRP was aware that Greenfield also was representing Chanen. Pet. App. 21a. Again, Greenfield's actions involved no trickery, intentional malice, instances of repeated misconduct, or deliberate false statements. And while respondents contend that Greenfield failed to make proper disclosures to HRP (Br. in Opp. 3), "the omission of a material fact may be less reprehensible than a deliberate false statement." *BMW*, slip op. 19. This case therefore "exhibits none of the circumstances ordinarily associated with egregiously improper conduct," meaning that Winston & Strawn's "conduct was not sufficiently reprehensible to warrant imposition of a [multi-million dollar] exemplary damages award." *Id.* at 20.

2. *BMW* held that the ratio of punitive damages to "actual harm inflicted on the plaintiff" may be an "indicium of an unreasonable or excessive punitive damages award." Slip op. 20. That is the case here. In arguing to the contrary, respondents point to the $1.2 million compensatory award, contending that the relevant ratio here is 2:1 or 3:1. Br. in Opp. 10-11. But as we explained in the petition (at 21-22) and reply brief (at 2-4), that contention plainly is incorrect. Greenfield

represented HRP for more than five years prior to joining Winston & Strawn, a period in which the Special Master found against HRP. In this setting, it defies common sense to believe that Greenfield's conduct *after* joining Winston & Strawn is the cause of *all* of HRP's damages. Indeed, the court of appeals itself opined only that "the jury could have reasonably concluded that but for Winston & Strawn's legal malpractice from March 1 to September 22, 1981, HRP could have *significantly reduced*" — not eliminated — its liability. Pet. App. 19a (emphasis added). It therefore is clear that the relevant ratio is substantially greater than 3:1. Because this issue was not addressed by the court below, a remand for exploration of the point in light of *BMW* would be appropriate.

3. *BMW* mandated a comparison of the punitive award "and the civil or criminal penalties that could be imposed for comparable misconduct." Slip op. 23. Here, there are *no* statutory penalties that could be imposed on Winston & Strawn. According "'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue" therefore means that a significant reduction in the award is in order. *Ibid.* (citation omitted). And "[i]n the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the [court below] in this case." *Id.* at 25. Because there is no such history of noncompliance here, the clear teaching of *BMW* is that the award in this case is grossly excessive and should not stand.

4. In opposing the petition, respondents contended principally that "the issues raised by the *BMW* case are not present in this case." Br. in Opp. 10. The decision in *BMW* makes plain that respondents are simply wrong on this point. The Court therefore should grant the petition, vacate the decision below, and remand the case so that it may be reconsidered in light of *BMW*.

Respectfully submitted.

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